FEB 28 1973

IN THE

# SUPREME COURT OF THE UNITED STATES

No. _____

## 72-1186

TOP VISION CABLE CO. OF KY. - - Petitioner

versus

CITY OF OWENSBORO, KENTUCKY, a Municipal Corporation of the Second Class, and IRVIN TERRILL, Mayor, WAITMAN C. TAYLOR, Commissioner, JOHN D. MILLER, Commissioner, JOHN O. FISHER, Commissioner, ALTON PUCKETT, Commissioner - Respondents

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## PETITION FOR CERTIORARI TO THE KENTUCKY COURT OF APPEALS

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IN THE

# SUPREME COURT OF THE UNITED STATES

No. _____

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TOP VISION CABLE CO. OF KY. - - *Petitioner*

*v.*

CITY OF OWENSBORO, KENTUCKY, a Municipal Corporation of the Second Class, and IRVIN TERRILL, Mayor, WAITMAN C. TAYLOR, Commissioner, JOHN D. MILLER, Commissioner, JOHN C. FISHER, Commissioner, ALTON PUCKETT, Commissioner - *Respondents*

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## PETITION FOR CERTIORARI TO THE KENTUCKY COURT OF APPEALS

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The Petitioner, Top Vision Cable Co. of Ky., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Kentucky Court of Appeals entered in this proceeding on September 22, 1972.

## OPINION BELOW

The opinion of the Kentucky Court of Appeals is reported at 487 Southwestern Second 283.

## JURISDICTION

The date of the entry of the judgment sought to be reviewed is September 22, 1972. A timely petition for rehearing was denied on December 15, 1972, and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

## QUESTIONS PRESENTED

I. Whether the Federal Communications Commission, by the enactment of regulations dealing with local franchise requirements for a Cable Television Franchise, has preempted this area of the law so that the severability of a franchise fee provision from the remainder of a franchise agreement must be determined as a matter of federal law and policy rather than state law?

II. Whether the Judgment of the Kentucky Court of Appeals results in a deprivation of Petitioner's property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States?

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional provision here involved is Section 1 of the Fourteenth Amendment to the Constitution of the United States, which is set out verbatim as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutory provision here involved in 47 U.S.C. §151, which is set out verbatim as follows:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

## STATEMENT OF THE CASE

The Petitioner is a corporation organized and existing under the laws of the Commonwealth of Kentucky. Since December, 1965, Petitioner has owned a franchise issued by the City of Owensboro, Kentucky, (hereinafter sometimes referred to as the "City"), which franchise entitled it to operate a cable television system within the city limits of Owensboro. Prior to the time this lawsuit was commenced, Petitioner had spent in excess of $430,000.00 in construction of such a system. Under the terms of the franchise, Petitioner was obligated to pay the City a franchise fee equal to 26% of the gross income received by Petitioner from its operation of the cable system.

On March 26, 1972, in the consolidated cases of *Wonderland Ventures, Inc.* v. *City of Sandusky, Wonderland Ventures, Inc.* v. *City of Fremont,* 423 F. 2d 548 (6th Cir., 1970), the Court of Appeals for the Sixth Circuit held that municipal ordinances which impose a gross receipts tax on cable television systems are unconstitutional because such a tax constitutes a burden upon proceeds from interstate commerce in violation of the Commerce Clause of the Constitution of the United States.

After the decision in *Wonderland Ventures, Inc.* v. *City of Sandusky, supra,* Petitioner instituted a declaratory judgment action in the United States District Court for the Western District of Kentucky, asking for a declaration that the gross receipts fee provision relative to its franchise be adjudged unconstitutional

pursuant to the rule announced by the federal circuit court in *Wonderland, supra.* Shortly thereafter, the Defendants, the Respondents herein, moved to dismiss that action due to the Court's lack of jurisdiction, basing their motion on a resolution passed after institution of the suit at a Board of Commissioner's meeting for the City of Owensboro. That resolution officially conceded the constitutional invalidity of the 26% gross receipts provision. The district court then dismissed the case for lack of jurisdiction since the sole federal issue involved there was the constitutionality of the gross receipts fee provision.

After the City's concession of the invalidity of the 26% gross receipts fee provision, the Petitioner attempted to renegotiate a franchise fee to be paid to the City for the rights granted by the franchise, but the City refused all attempts to enter into such negotiations. The City took the position that, nothwithstanding a clear-cut severability clause in the franchise agreement, the invalidity of the fee provision invalidated the entire Franchise Agreement (Appendix, pp. 27-34), and therefore the Petitioner no longer had a franchise to exercise. The present action was originally filed in the Daviess Circuit Court by the Petitioner on December 19, 1970, with the Petitioner asking that the court rule, in part, that the invalidity of the franchise fee provision did not invalidate the entire Franchise Agreement, and thereby deprive it of its franchise. In addition, the Petitioner asked the Court to direct the City to renegotiate the franchise fee provision so that Petitioner could move forward and exercise its franchise.

On April 6, 1971, the trial court, relying in part upon the clear-cut severability clause in the Franchise Agreement, ruled that the Franchise Agreement remained valid and enforceable despite the unconstitutional fee provision, and ordered the City to renegotiate that fee provision based upon the burdens imposed or likely to be imposed by the CATV system upon the public ways of the City (Appendix, p. 15). The Respondent appealed from the decision of the Daviess Circuit Court, and the Kentucky Court of Appeals, in a ruling issued on September 22, 1972, in which the severability clause is ignored, held that the entire Franchise Agreement was void due to the invalidity of the gross receipts fee provision (Appendix, pp. 16-26).

Prior to the date of the decision by the Kentucky Court of Appeals, but subsequent to the time the case had been submitted on briefs to that Court, the Federal Communications Commission issued detailed regulations pertaining to franchise fees paid by franchisees to a municipality for a cable television franchise. As of March 31, 1972, the FCC rule provided that

> The franchise fee must be reasonable (e.g., in the range of 3-5% of the franchisee's gross subscriber revenues per year from cable television operations in the community (including all forms of consideration, such as initial lump sum payments)). *P & F Radio Reg.* ¶85.31 (March 31, 1972).

In its Petition for Rehearing, filed with the Kentucky Court of Appeals on October 20, 1972, (Appendix, pp. 41-50) the Petitioner argued that by these rules

the Federal Communications Commission had preempted the area relating to franchise fees and CATV franchises, and that as a result the question of the validity or invalidity of the Franchise Agreement must be decided by looking to the federal law, federal regulations, and federal policy rather than state common law. In addition, Petitioner noted the Kentucky court's failure to face the issue of the severability clause and requested that the Kentucky court squarely pass on this issue.

On December 15, 1972, the Court of Appeals, without issuing an opinion, overruled the Petitioner's Petition for Rehearing.

## ARGUMENT

**I. The Federal Communications Commission, by the Enactment of Regulations Dealing With Local Franchise Requirements for a Cable Television Franchise, Has Preempted This Area of the Law so That the Severability of a Franchise Fee Provision From the Remainder of a Franchise Agreement Must Be Determined as a Matter of Federal Law and Policy Rather Than State Law.**

It is accepted that the Federal Communications Commission (hereinafter referred to as "Commission") has the authority pursuant to the Communications Act of 1934, 47 U.S.C. §151, to fully and completely regulate cable television, *United States* v. *Southwestern Cable Co.*, 392 U. S. 157 (1968), and that such regulation is necessary and desirable considering the impact that cable television has had and will continue to have on the national communications network.

> CATV systems, formerly no more than local auxiliaries to broadcasting, promised for the future to provide a national communications system, in which signals from selected broadcasting centers would be transmitted to metropolitan areas through the country. *United States* v. *Southwestern Cable Co., supra.* at 164.

Since 1960, the Commission has responded to the increasing national importance of cable television by gradually asserting its jurisdiction over the operation of such systems. *Id.* at 165. In February, 1972, the Commission further extended its jurisdiction in this area by adopting extensive rules regarding the issuance of cable television franchises and the operation of these cable systems. *See* CABLE TELEVISION REPORT AND ORDER, 24 RR 2d 1506 (February 2, 1972). The rules became effective as of March 31, 1972.

In its REPORT, the Commission voiced increased concern over the large local franchise fees being paid by certain cable systems, and the burden such fees place upon the ability of a cable television system to provide efficient and inexpensive service to its customers, to the ultimate detriment of the national communications policy.

> The ultimate effect of any revenue raising fee is to levy an indirect and regressive tax on cable subscribers. Second, and of great importance to the Commission, high local franchise fees may burden cable television to the extent that it will be unable

> to carry out its part in our national communications policy. CABLE TELEVISION REPORT AND ORDER, *supra,* at 1578.

As the result of these concerns, the Commission ruled that the "maximum franchise fees should be between 3 and 5% of gross subscriber revenues." *CATV Rules,* 24 RR 1501, 1506 (1972).

In addition to enacting the rule regarding maximum franchise fees, the Commission also adopted other rules relating to the type and nature of a franchise to be granted a cable television system. For example, the Commission established time tables for the construction and operation of cable systems, *CATV Rules,* 24 RR at 1505, and ruled that reasonable limits must be placed on the duration of franchises, which in most cases are not to exceed fifteen years. *Id.* The Commission also established rules regarding the minimum channel capacity, *Id.,* access to channels, *Id.,* and many other matters related to requirements under local franchise agreements. It is interesting to note that the Commission expressly provided that there were certain issues related to cable television which were to remain within the jurisdiction of the state. Thus, the Commission ruled that "(d)elineation of franchise areas is a matter for local authorities to be exercised on a nondiscriminatory basis." *Id.* In the same manner, the Commission gave to local authorities the power to regulate subscriber rates. *Id.* In essence, it seems clear that by the adoption of this comprehensive scheme for the regulation of cable television the Commission has totally preempted the state of any authority to

dictate franchise provisions or standards, with the exception of those areas expressly left to the state or local body.

With the federal government, through the Commission, having occupied this area, questions relating to the continuing validity of a franchise and the severability of a franchise fee provision from the remainder of the Franchise Agreement in particular, must be governed by uniform federal rules rather than state common law or state statutes. *See, Western Union Telegraph Co.* v. *Speight,* 254 U. S. 17 (1920); *O'Brien* v. *Western Union Telegraph Co.,* 113 F. 2d 539, 541 (1st Cir., 1940); cf. *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448 (1957).

The Commission has attempted to provide for a uniform system of regulation and control of cable television for the benefit of the public. If the decision of the Kentucky Court of Appeals in the instant case is allowed to stand, it will mean that Kentucky courts have the authority to disregard federal policy and federal efforts to provide uniform standards for cable television and federal efforts to establish a national communications system. The Kentucky Court of Appeals did not consider the Commission's CATV Rules, effective prior to the date of its decision in the instant case, nor did it make any attempt to consider federal policy in its decision. That Court's judgment amounts to a decision that the attempt by the FCC to regulate cable television will result in the invalidation of every franchise agreement in Kentucky where the franchise provisions are not in conformity with the Commission's rules.

The FCC's purpose to be served by the enactment of these rules and regulations was to "open up Cable's potential to serve the public," *Proposals for Regulation of Cable Television Submitted to Congress by the Federal Communications Commission* (August 5, 1971), not to invalidate all franchises which do not conform to the rules. The FCC reemphasized this purpose in a Letter Ruling, dated August 22, 1972, entitled "Franchise Provisions at Variance with FCC Cable Television Rules" (Appendix, pp. 35-39) in which it stated

> that franchises (should) be drawn to include severability clauses that will enable the Commission to authorize system operations without the delay that might be created by the necessity for franchise amendment.

The Franchise Agreement in question here has such a severability clause, yet the Kentucky Court of Appeal's decision disregarded not only the clause, but the federal purpose to be served by such a clause.

In sum, what we have here is a train of events which, if undisturbed by this Court, could pose the invalidity of franchise agreements throughout the country. As set forth above, the national policy concerning franchise fees resulting from the adoption by the Commission of CATV Rules is that all franchise fees established by local grantors of CATV franchises should not exceed the range of 3% to 5% of gross receipts. The law as enunicated by the Court of Appeals for the Sixth Circuit in *Wonderland Ventures, Inc., supra,* is that a franchise fee provision based upon some substantial percentage of gross receipts is uncon-

stitutional as an improper burden upon interstate commerce. Clearly, neither the Court of Appeals for the Sixth Circuit nor the FCC intended that the invalidity of certain franchise fee provisions should result in the wholesale invalidation of cable television franchises. However, unless this Court sets aside the action of the Kentucky Court of Appeals here in affirming the action of the City of Owensboro, it will be open to every municipality and regulatory agency in the states and cities of the country to invalidate CATV franchises and to frustrate the national policy established by the FCC.

## II. The Judgment of the Kentucky Court of Appeals Results in a Deprivation of Petitioner's Property Without Due Process of Law, in Violation of the Fourteenth Amendment to the Constitution of the United States.

A franchise issued for any purpose by the state or any subdivision within the state, has long been recognized as property which the franchisee cannot be deprived of except by due process of law. *See, e.g., Tennessee Electric Power Co.* v. *Tennessee Valley Authority,* 306 U. S. 118, 142 (1938); *Conway* v. *Taylor,* 66 U. S. 603, *Crittenden County* v. *McConnell,* 237 Ky. 806, 36 S. W. 2d 627 (1931). Any state action which results in the loss to the Petitioner of its franchise rights without a full consideration by a judicial body of each and every relevant fact must be considered state action which violates Petitioner's right to due process under the Fourteenth Amendment. The judgment of the Kentucky Court of Appeals, declaring the Petitioner's franchise to be void, was made without

any consideration of the intent of the parties, as expressed in the Agreement, or the stated national policy favoring the constant availability of cable television service to the public. As a result, the Court's action was arbitrary and capricious, resulting in a deprivation of Petitioner's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The Kentucky Court of Appeals absolutely refused to consider the fact that the Franchise Agreement contained a severability clause which expressly provided that should any provision of the Franchise Agreement be held invalid, "such invalidity shall not affect the validity of this grant as a whole, or any part thereof, other than the part declared invalid" (Appendix, p. 33). While the Court of Appeals recognized the existence of that provision, that Court completely failed to grant any weight to the expressed intention of the parties, as stated in the severability clause.

Furthermore, severability was not only the expressed intention of the parties, but it is also an essential part of the national policy concerning cable television franchises, as enunciated by the Commission. In a Letter Ruling, dated August 22, 1972, and entitled "Franchise Provisions At Variance with FCC Cable Television Rules" (see Appendix, p. 39), the Commission stated

> that franchises (should) be drawn to include severability clauses that will enable the Commission to authorize system operations without the delay that might be created by the necessity for franchise amendment.

This statement of policy by the Commission, brought to the Court of Appeals' attention in Petitioner's Petition for Rehearing, was intended to facilitate the continuation of cable television service in situations such as the one presented here. Yet that national policy, as well as the expenditure by Petitioner of an amount in excess of $430,000.00 to provide the residents of Owensboro with cable television service was totally ignored by the Kentucky Court of Appeals.

The Court of Appeals' refusal to consider the stated national policy concerning cable television franchise agreements and the expressed intention of the parties regarding the severability of provisions within the Franchise Agreement, was arbitrary and capricious, and its judgment amounts to a deprivation of Petitioner's property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

## CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the Kentucky Court of Appeals.

Respectfully submitted,

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# APPENDIX

# DAVIESS CIRCUIT COURT

**DIVISION II**

Civil Action No. 13298

---

TOP VISION CABLE CO. OF KY., a Kentucky Corporation - - - - - - - - - *Plaintiff*

*v.*

CITY OF OWENSBORO, KENTUCKY, a Municipal Corporation of the Second Class, and
IRVIN TERRILL, Mayor,
WAITMAN C. TAYLOR, Commissioner,
JOHN D. MILLER, Commissioner,
JOHN C. FISHER, Commissioner and
ALTON PUCKETT, Commissioner - - - *Defendants*

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## JUDGMENT

This cause having come on for hearing this 6th day of April, 1971, upon the motion of the defendants to dismiss and the motion of the plaintiff for Summary Judgment; the Court having considered the pleadings, exhibits, memoranda and argument of counsel, and the Court being advised, it is hereby

ORDERED: (1) The defendants' motion to dismiss be, and hereby is, OVERRULED.

(2) That the plaintiff's motion for Summary Judgment be, and hereby is, SUSTAINED as follows:

1. That Paragraph 2 of the agreement of December 17, 1965, by and between the City of Owensboro, Kentucky, and Top Vision Cable Co., Inc. of Ky. be, and hereby is, found severable from the remainder of the agreement and

the remainder of the agreement be and hereby is declared valid.

2. That the plaintiff and the defendants be, and hereby are, directed to renegotiate the payment provisions of Paragraph 2 of the aforesaid agreement of December 17, 1965, to arrive at a reasonable and fair sum based upon the privileges granted and the burdens imposed or likely to be imposed under the aforesaid agreement upon the public ways of the City of Owensboro, Kentucky.

3. That the defendants grant unto the plaintiff a reasonable period of time within which to complete construction of the CATV system provided for under the aforesaid agreement of December 17, 1965.

4. That the defendants be and hereby are permanently enjoined and prohibited from soliciting or considering bids or granting a franchise for a CATV operation within the City of Owensboro to any party within the period of such reasonable time for completion of construction of the CATV system as shall be agreed to pursuant to 3 above.

5. The plaintiff shall be, and hereby is, denied the right to recover fees heretofore paid to the City of Owensboro pursuant to the agreement of December 17, 1965.

THE COMMONWEALTH OF KENTUCKY

The Court of Appeals

Fall Term—September 22, 1972

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Top Vision Cable Co. of Ky., A Ky. Corp.

v.

City of Owensboro, Ky., Etc., Et Al.

} Appeal from a judgment of the Daviess Circuit Court

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**MANDATE**—Issued December 15, 1972

The Court being sufficiently advised, it seems the judgment herein is erroneous.

It is therefore considered that said judgment be reversed for proceedings consistent with the opinion herein; which is ordered to be certified to said court.

It is further considered that the cross-appellant recover of the cross-appellee its cost herein expended.

(s) Frances Jones Mills
C. A. A.

# COURT OF APPEALS OF KENTUCKY

**RENDERED: SEPTEMBER 22, 1972**

---

CITY OF OWENSBORO, KENTUCKY, a Municipal Corporation of the Second Class, Et Al. - - - - - - - - - *Appellants*

*v.*

TOP VISION CABLE COMPANY OF KENTUCKY, a Kentucky Corporation - - - - - *Appellee*

AND

TOP VISION CABLE COMPANY OF KENTUCKY, a Kentucky Corporation - - *Cross-Appellant*

*v.*

CITY OF OWENSBORO, KENTUCKY, a Municipal Corporation of the Second Class, Et Al. - - - - - - - - *Cross-Appellees*

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*Consolidated Appeals from Daviess Circuit Court*
*Division II*
*Honorable Dan M. Griffith, Judge*

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## OPINION OF THE COURT BY COMMISSIONER GARDNER—REVERSING

The City of Owensboro advertised for bids for a franchise to provide the citizens with community antenna television service (CATV). Top Vision Cable Company of Kentucky was granted the franchise. Pertinent provisions of the franchise agreement were as follows:

The effective date was December 17, 1965, with the grantees' having the privilege of continuing for 15 years.

Top Vision was granted the right to use the public ways of the city necessary for proper installation and maintenance of the system and also the city granted Top Vision the right, insofar as it could, to use poles and equipment of other utility companies within the city.

Construction was to be completed within two years. If not completed within two years the franchise was to become null and void. The city, in its discretion, could "extend said two (2) year deadline from time to time upon written application for same by the second party. * * *"

Top Vision was to provide coverage of all telecasts originating within a 40-air-mile radius of Owensboro.

Top Vision was to pay the city a sum equal to 26 percent of the gross income from the business within the City of Owensboro.

If any provision of the franchise agreement was declared invalid, such declaration would not affect the remainder of the franchise.

Soon after the franchise was granted the Federal Communications Commission promulgated a rule prohibiting the importation of distant television signals into the top 100 television markets. Owensboro is located in one of the 100 largest markets, to wit, the Evansville, Indiana, market. Enforcement of the rule would prevent Top Vision from picking up television signals from Louisville, Nashville, Bowling Green and Paducah. While the franchise agreement required that Top Vision supply coverage of telecasts originating from transmitters located only within a 40-mile radius of Owensboro, it was alleged by Top Vision and seems to have been acknowledged by the city, as shown by subsequent events, that it was anticipated by both parties that a wider coverage would be supplied. Top Vision alleged that the FCC rule was such a disappointment to prospective customers that many refused to accept

Top Vision's service. This in turn, Top Vision claimed, made it more difficult to obtain capital to complete the work.

Before the initial two-year period expired Top Vision requested and was granted a 12-month extension of time (to December 20, 1968) in which to provide the service. The resolution authorizing the extension contained the provision, "* * * Whereas, the Board of Commissioners is aware of the matters now pending between the Top Vision Cable Company and the Federal Communications Commission and deem said request for an extension of time to be reasonable; * * *." Near the end of the extended period Top Vision requested and was granted another extension to December 20, 1970. The resolution recited, "Whereas, the Board of Commissioners deem the unforeseen stringent regulation of the Federal Communications Commission now in force and the proposed proceedings challenging them, sufficient cause for granting the written application of Top Vision Cable Company, Inc. for an extension of time within which to complete its system with the City, * * *."

Top Vision states that the city actively participated in trying to obtain a waiver of the FCC rule; that city officials wrote letters in behalf of Top Vision to the FCC and one of the city commissioners made a personal appearance before the FCC on May 21, 1969, in an effort to get a waiver of the ruling.

On March 26, 1970, in the consolidated cases of Wonderland Ventures, Inc. v. City of Sandusky, etc., 423 F. 2d 548 (6th Cir.) (1970), cert. denied, 400 U. S. 824, the Court of Appeals for the Sixth Circuit held that the ordinance there in issue (similar to that contained in the present franchise) imposed a gross-receipts tax on CATV systems and was unconstitutional as a burden on interstate commerce in violation of the commerce clause of the United States Constitution. In the wake of that decision, Top Vision requested that it and the city "renegotiate" the amount to be

paid for the use of the public ways of the city. The city refused. Thereupon Top Vision instituted action in the federal court to have declared invalid the provision whereby it was to pay 26 percent of the gross receipts to the city. The city filed a pleading acknowledging the invalidity of the 26-percent provision and the suit was dismissed because no actual controversy existed. The order of dismissal was entered November 23, 1970.

On November 4, 1970, Top Vision made a written request to the city for the third extension. The request was denied by resolution dated November 6, 1970. The present action was instituted by Top Vision on December 19, 1970.

In its complaint Top Vision asked that it be declared that the city had no authority to require that local CATV operations be franchised by the city, and that it be declared that the city could not deny Top Vision the privilege of using the public right of ways upon payment of a reasonable fee. In the alternative Top Vision asked that it be declared that the 26-percent clause was severable and that the remainder of the franchise agreement be held valid with further declarations that Top Vision be required to pay only a reasonable sum for the use of the public ways, that Top Vision be given a reasonable time within which to complete the project, that the city refund the amounts paid under the 26-percent clause, and that the city be prohibited from advertising for the granting of another franchise during the pendency of the action.

The city's motion to dismiss the complaint was overruled. On the same day Top Vision moved for a summary judgment and on the same day the motion for summary judgment was sustained and judgment entered. The judgment made no mention of Top Vision's demand that it be declared that the city had no legislative authority to require CATV operations to be franchised. The judgment provided (1) that the 26-percent clause was severable and the remainder of the agreement was valid, (2) that the city

and Top Vision renegotiate and arrive at a reasonable amount to be paid for the use of the public ways, (3) that the city grant Top Vision a reasonable time in which to complete the project, (4) that the city be enjoined from soliciting or considering bids or granting an exclusive franchise for a CATV operation within the city, and (5) that Top Vision not recover the fees paid under the invalid 26-percent clause.

In the city's motion to vacate the judgment one of the grounds was that the judgment was entered without the city's having filed an answer. It is noted that the city waived notice of motion for summary judgment. The judgment recites that the cause was submitted upon motion of the city to dismiss the complaint and upon motion of Top Vision for summary judgment. The judgment also recites that the court "considered the pleadings, exhibits, memoranda and argument of counsel." CR 12.02 provides that when upon motion to dismiss because the pleading fails to state a claim matters outside the pleading are presented, the motion shall be treated as one for summary judgment. It is obvious that the court and the parties treated the kindred motions together and that the efforts of the prospective parties relative to the motion to dismiss were also relied on in the motion for a summary judgment. It was not until after the summary judgment had been entered that the city raised the point that it had not filed its answer.

An anomolous situation is presented where *both* parties contend that the franchise agreement is invalid. The city argues that since the 26-percent clause is an integral and vital provision of the franchise, and since the federal court, in effect, held the clause unconstitutional, the franchise agreement is invalid in its entirety. Top Vision on the other hand contends that the invalidity arose because the city had no constitutional or statutory authority in the first place to require a CATV business to be franchised.

Ordinarily where both parties argue that a contract is invalid the court would simply agree and enter an order to that effect. In the present instance, however, the reason for the invalidity would have an important effect on further proceedings. If the reason is as contended by the city, the city could readvertise for bids and grant a franchise to someone other than Top Vision. If Top Vision's contention is sound, then the furnishing of cable reception to the viewers would be on an open-market basis.

First we shall look at Top Vision's contention that the judgment was erroneous because it was predicated on the city's having authority to require a CATV business to be franchised. Section 163 of the Kentucky Constitution is as follows:

> "No street railway, gas, water, steam heating, telephone, or electric light company, within a city or town, shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus along, over, under or across the streets, alleys or public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city or town being first obtained; but when charters have been heretofore granted conferring such rights, and work has in good faith been begun thereunder, the provisions of this section shall not apply."

Section 164 of the Kentucky Constitution is as follows:

> "No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the

same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway."

KRS 96.050 reads in part as follows:

"SECOND-CLASS CITY MAY REGULATE CONSTRUCTION AND OPERATION OF UTILITIES—The legislative body of any city of the second class may, by ordinance:

(1) Direct and control the laying and construction of railroad or street railway tracks, bridges, turnouts and switches, poles, wires, apparatus and appliances in the streets and alleys of the city, and the location of depot grounds within the city."

This court has ruled decisively that services other than those enumerated in section 163 of the Kentucky Constitution are subject to franchise. In the case of Ray v. City of Owensboro, Ky., 415 S. W. 2d 77 (1967), the right of the city to require a franchise for the operation of ambulance service was attacked. We said:

"It will be noted that section 163 deals with certain specific subjects, to-wit, street railway, gas, water, steam heating, telephone or electric light companies within a city or town. We do not believe the right granted cities by this section is today limited to these specific utilities. The purpose of the section was to give the city control of the streets, alleys and public grounds and to make it possible for the city to provide the services of these utilities to its inhabitants. Therefore, the right granted is not and properly should not be restricted to those utilities enumerated, but applies to all utilities and services which might today be proper subjects for control, when the original intent and purpose of the act is considered."

We have held the following projects to be subjects for franchise: Garbage collection, City of Bowling Green v. Davis, 313 Ky. 203, 230 S. W. 2d 909 (1950); automobile-bus line operating over streets, People's Transit Co. v. Louisville Railway, 220 Ky. 728, 295 S. W. 1055 (1927); right to use a part of a river bed for the extraction of sand and gravel, Willis v. Boyd, 224 Ky. 732, 7 S. W. 2d 216 (1928).

It cannot be denied that television is an integral part of American life. It possesses many of the attributes of a public utility. It is of a public nature. It is said in 36 Am. Jur. 2d, Franchises, section 3, page 825:

> "Generally speaking, the right to carry on any business of a public nature, such as the establishment, construction, and operation of a public utility and the collection of tools or charges for its use or service, or the use of highways for such purpose, is a franchise."

Of rather recent vintage is the cable system. It is rapidly gaining in popularity. It enables the viewer to see a clearer picture. Especially is it desirable where the originating signal is far away. Stringent regulations of CATV by the FCC have been upheld by the Supreme Court of the United States. See United States v. Mid-West Video Corp., ___ U. S. ___, 92 S. Ct. 1860 (decided June 7, 1972). We cannot accept Top Vision's argument that the city is not involved because the cables and wires will be placed on poles and strung over public ways where existing utility companies have the right to operate by other franchises. It is not shown, in the first place, that all cables and wires will be constructed and used coincidentally with existing equipment of other utilities, and, in the second place, under its general obligation to provide its citizens with safe, clean and unobstructed public ways, the presence of television cables, even in connection with existing utilities, would be

an added burden on the city. We are of the opinion that the right to operate a community antenna television service in a city is a subject for franchise. We are also of the opinion that a franchise is an agreement between the granting authority and the holder and partakes of the usual incidents of a contract. See City of Louisville v. Louisville Home Telephone Co., 149 Ky. 234, 148 S. W. 13 (1912); Prestonsburg Water Co. v. Dingus, 271 Ky. 240, 111 S. W. 2d 661 (1937); City of Bowling Green v. Davis, 313 Ky. 203, 230 S. W. 2d 909 (1950); and 36 Am. Jur. 2d, Franchises, section 6, page 728.

The city further contends that the 26-percent clause cannot be severed from the remainder of the agreement without doing violence to one of the underlying purposes of the franchise, to-wit, to provide revenue to the city, and the elimination of the clause vitiated the contract. This contention, we believe, is sound. It is true that the primary purpose of a public utility, including cable television, is to make available adequate service to the customers (Louisville Home Telephone Co. v. City of Louisville, 130 Ky. 611, 113 S. W. 855 (1908)) but also of importance is the remuneration to be received by the public authority. Both parties entered into the contract in good faith. On the strength of the contract Top Vision says it expended some $430,000. The city expected to receive 26 percent of the gross receipts. Since Top Vision was unwilling to pay the amount it agreed to, when it was determined the 26-percent clause was invalid, then the city was within its rights in declining to extend the franchise.

We are of the opinion, and the city concedes, that Top Vision is entitled to recover the equipment and materials it is using in connection with the project. The circuit court should determine and grant Top Vision a reasonable time to remove or sell the property.

Top Vision insists it is entitled to a refund of the amount paid to the city under the invalid 26-percent clause. The arguments of the respective sides have been well briefed. Top Vision argues that the rule in this jurisdiction is that money paid under a mistake of law may be recovered, citing Spalding v. City of Lebanon, 156 Ky. 37, 160 S. W. 751 (1913). The city counters by saying that since Top Vision has utilized the public ways it cannot recover the amounts paid for that privilege, citing Postal Telegraph Cable Co. v. City of Newport, 160 Ky. 244, 169 S. W. 700 (1914), and Bastin Telephone Co. v. Mount, 176 Ky. 26, 195 S. W. 112 (1917). Upon a remand of the case we believe the trial court should determine the question of remuneration to the city on the basis of what a reasonable fee would be for Top Vision's use of the city's public ways for the CATV service. If overpayment has been made then the excess should be refunded to Top Vision.

Since we have determined that the contract was invalid by virtue of the 26-percent clause we see no need to discuss another argument made by the city that Top Vision's failure to complete the project within the two years specified by the contract vitiated the contract nor Top Vision's counterargument that the city was estopped from insisting on the forfeiture.

Judgment is reversed and the case remanded for further proceedings consisting with this opinion.

Steinfeld, C.J., and Hill, Milliken, Osborne, Palmore, and Reed, JJ., concur.

Neikirk, J., concurs in result only.

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## FRANCHISE AGREEMENT

This Franchise Agreement made and entered into on this the 17th day of December, 1965, by and between the City of Owensboro, Kentucky, a municipal corporation of the second class, Party of the First Part, and TOP VISION CABLE COMPANY, INC. OF KENTUCKY, Party of the Second Part.

WITNESSETH: That for and in consideration of the public service to be rendered by the party of the second part to the residents of Owensboro, Kentucky, and the further consideration as more fully set out herein, the party of the first part does hereby grant unto the party of the second part, its successors and assigns, for a period of fifteen (15) years from the date hereof, the franchise and privilege of using the public ways, streets, highways, bridges or public places of the City of Owensboro, Kentucky, for the supplying of visual and audio television and radio signals to the public, subject to the following terms, conditions and covenants, to-wit:

1. The party of the second part, its successors or assigns, shall have the franchise, privilege, right and power to erect, install, construct, re-construct, replace, remove, repair, maintain and operate in or upon, under, above, across and from the streets, avenues, highways, sidewalks, bridges and other public ways, easements, right-of-way and lands, as now existing and all extensions thereof and additions thereto, in the City of Owensboro, Kentucky, all equipment, facilities, appurtenances and apparatus of any nature for the purpose of receiving, amplifying, transmitting and distributing therefrom radio, electrical and electronic energy, pictures, sounds, signals, impulses and communication, uni-directional and multi-directional of every nature and description, audio and video, embracing any and all of the frequencies of the electrical magnetic spectrum and to

otherwise engage in the business, services and activities generally known as and practiced now and in the future by community antenna television and audio communication services in accordance with the laws of the United States of America, the Commonwealth of Kentucky and the City of Owensboro, Kentucky, for a period of fifteen (15) years from and after the date hereof; but subject to the restrictions and provisions herein contained.

2. The party of the second part, in consideration of the terms of this franchise, agrees to pay to the party of the first part a sum equal to the cost of the advertising and selling of this franchise, upon proper billing by first party to second party plus the sum of money equal to 26% of the gross income received by the party of the second part from all sources whatsoever derived within the City of Owensboro, the payment of which shall be payable one-half (½) thereof in semi-annual payments. Said semi-annual payment dates shall be the 30th day of June and the 31st day of December of each year and each semi-annual payment shall be made within 30 days thereafter. The party of the second part shall keep complete records of accounts showing dates and payments received and any duly authorized agent of the City of Owensboro shall have the right, power and authority to inspect the gross monthly income records of the party of the second part.

3. There is hereby granted to the party of the second part, insofar as the City of Owensboro may legally grant same, the further right, privilege and authority to lease, rent or in any other manner obtain the use of towers, poles, lines, cables and other equipment and facilities from any city owned utility and any and all holders of public licenses and franchises within the corporate limits of the City of Owensboro, subject to all existing and future ordinances, regulations and laws of the City of Owensboro and the Commonwealth of Kentucky. It is the stated intention of the party of the first part that all holders of public licenses

and franchises within the corporate limits of the City of Owensboro shall cooperate with the party of the second part to allow party joint usage of their poles and pole-line facilities whenever possible and whenever such use does not interfere with the normal operations of such poles and pole-lines. However, the party of the second part shall own and have complete responsibility for the maintenance and operation of the full system and that responsibility shall not be divided. Prior to the erection or installation of any such towers, poles, guys and anchors on any municipal properties, including public ways and easements, the party of the second part shall secure approval of said location by the City Manager of the City of Owensboro or any other authorized person designated by the City and also secure approval from any state or county official of any locations on the properties, including public ways and easements of the State of Kentucky and County of Daviess. Such permission shall not be unreasonably withheld on the part of the City.

4. The party of the second part shall, during the existence of this franchise, furnish reasonable, adequate and efficient community antenna reception service to the subscribers connected to its system within the corporate limits of the City of Owensboro and said party of the second part agrees to construct and maintain its system in reasonable repair and working order, said system to be constructed with top grade American made equipment and second party These maintenance requirements may be temporarily suspended by disaster or emergency conditions or other circumstances beyond its reasonable control.

5. The party of the second part shall charge only reasonable rates for the service rendered to its customers, but shall not as to any rates, charges, service facilities, rules, regulations or in any other respect make or grant any shall provide adequate facilities for maintenance of same. preference or advantage to any person or subject any per-

son to any prejudice or disadvantage, provided, however, they shall not be deemed to prohibit the establishment of a graduated scale of charges and classified rate schedules to which any customer, within such classification shall be entitled.

6. The party of the second part shall not directly or indirectly engage in any phase of the business of television receiving set sale, lease, repair or maintenance within the City of Owensboro, Daviess County, Kentucky, nor shall it use its community antenna television, radio and audio communication services constructed under this franchise for the purpose of pay television.

7. No privilege or exemption is granted or deferred by this franchise except these specifically prescribed herein. Any privilege claimed under this franchise in any street, public way or easement shall be subordinate to any prior lawful occupancy of the street and to all laws, ordinances and regulations of the City of Owensboro, State of Kentucky and the United States of America. No rights, franchise or privileges herein granted are to be exclusive.

8. The party of the second part shall at all times indemnify, protect and save harmless the City of Owensboro, any official, agency, commission or board thereof from and against any and all liability, losses and physical damage to property and bodily injury or death to persons, including payments made under Workmen's Compensation laws which may arise out of or be caused by the erection, construction, replacement, removal, maintenance and operations of the party of the second part's community antenna television and audio communications service and resulting from or by any negligent fault or misconduct on its part or by its agents, officers, servants and employees and it shall carry a policy or policies of liability insurance indemnifying all loss, damage or destruction of property to the extent of $25,000.00 and as to any one person, city,

agency or board in the amount of $100,000.00 and as to any one accident resulting in liability on account of injury to or death of one person and in the amount of $300,000.00 as to any one accident as it may relate to damages to persons and property.

9. The party of the second part shall, in the case of any opening or obstruction in the streets or other public ways of the City of Owensboro made by it in the course of construction, operation or removal of its installations, guard such activity by the placement of adequate barriers, fences or boardings, the bonds of which during the periods of dusk and darkness shall be clearly designated by warning lights. In the case of any disturbance or damage to any streets or public ways occurring in the course of erection, installation, construction, reconstruction, replacement, removal, repair, maintenance or operation, the party of the second part shall properly repair and restore same at its own expense. In the event that at any time the party of the first part shall lawfully elect to alter any street, alley or other public way, the party of the second part shall, upon reasonable notice, remove or relocate its poles, wires, cables, conduits or other fixtures at its own expense.

10. The party of the second part shall include in its coverage to its customers any telecast originating from a transmitter located within a forty (40) air mile radius from the City of Owensboro, Kentucky, provided that such telecasts effect either a Grade A, or Grade B, contour in the City of Owensboro as indicated in the current edition of Television Factbook, or any other authoritative publication carrying such designation. It is further agreed and understood that notwithstanding any of the foregoing, the party of the second part shall at all times include within its coverage to its customers telecasts from all of the major networks.

11. The party of the first part may declare a forfeiture of the franchise herein granted in the event of substantial violation of any of the terms hereof upon written notice to the party of the second part specifying the nature of the violation unless such violation is corrected or ceases to exist within sixty (60) days from the date of the written notice of same to the party of the second part. Such forfeiture shall be by resolution of the Board of Commissioners of the City of Owensboro, Kentucky.

12. The party of the second part shall, within sixty (60) days from the date hereof, make proper application to the Federal Communications Commission and to any and all other governmental agencies, both state and federal as is provided by law, for any permits, licenses or approvals necessary to construct, maintain and operate the system. The party of the second part shall commence the construction of the system herein at a reasonable time from the securing of such permits, licenses and approvals and shall prosecute such construction with due diligence; it being understood, as a condition of this franchise, that the construction of such system shall be completed to the extent of making available community antenna service to substantially all of the citizens of Owensboro, Kentucky, on or before two (2) years from the date herof or this franchise shall be and become null and void without notice or further act by the party of the first part. For cause, in its sole discretion, the Board of Commissioners of the City of Owensboro, Kentucky, may extend said two (2) year deadline from time to time upon written application for same by the second party at least sixty (60) days prior to said deadline or extension thereof.

13. The franchise, right, privilege and power herein granted, together with all of the terms and conditions hereof, shall extend and apply to the successors and assigns of the

party of the second part, however, no assignment of same may be made, except by operation of law, until said assignment has been approved by a resolution of the Board of Commissioners of the City of Owensboro, Kentucky, which approval shall not be unreasonably withheld. In the event such assignment takes place with such consent, then immediately upon the delivery to the City of Owensboro of the aforesaid agreement of assignment, duly executed by the assignee, all of the rights, obligations and privileges herein granted to the second party shall forthwith devolve upon the assignee who shall in all respects stand in the place and stead of the original corporation hereunder. In the event the party of the second part, or its successors or assigns shall be adjudged bankrupt or placed in receivership, the party of the first part may, at its option, declare the rights herein granted to be forfeited and terminated.

14. As part of the consideration for the rights and privileges herein granted, the party of the second part agrees to provide one free drop, with no monthly service charge to the City Hall building, fire and police stations, public library and to all public and parochial primary and secondary schools located within the City of Owensboro, Kentucky, which are passed by a cable.

15. It is agreed and understood that the party of the second part shall not erect its receiving tower in an area of Daviess County, Kentucky, that will interfere in any manner with aircraft approaches to the Owensboro-Daviess County Airport and shall secure approval of such location from the F.A.A. prior to constructing such receiving tower.

16. In the event any section, clause, paragraph or provision of this grant shall be declared invalid by a court of competent jurisdiction, such invalidity shall not affect the validity of this grant as a whole, or any part thereof, other than the part declared invalid.

IN TESTIMONY WHEREOF, witness the signatures of the parties hereto on this the day and date first hereinabove written.

CITY OF OWENSBORO, KENTUCKY
By /s/ DUGAN BEST
*Mayor*

TOP VISION CABLE COMPANY, INC. OF KENTUCKY
By /s/ HAROLD R. SAGRAVES
*Vice-President*

*Attest:*

/s/ ADELLE SHELTON
*City Clerk*
(SEAL)

State of Kentucky }
City of Owensboro } Sct.

The undersigned as City Clerk of the City of Owensboro, Kentucky, hereby certifies that the above is a true copy of Franchise Agreement as same appears on the records of the City of Owensboro, of which records the undersigned is legal custodian.

This July 24, 1970.

/s/ ADELLE SHELTON,
*City Clerk*

NEWS

Federal Communications Commission
1919 M. Street, N.W.
Washington, D. C. 20554
Public Notice

For information on releases and texts call 632-0002

87959

August 22, 1972—G

## FRANCHISE PROVISIONS AT VARIANCE WITH FCC CABLE TELEVISION RULES

The following letter has been sent to Western Communications, Inc. by Sol Schildhause, Chief of the Cable Television Bureau, in response to an inquiry about the extent to which Federal-State/local franchising authorities can establish regulations which are different from those established by the FCC for cable television systems:

This is in reply to your letter of August 3, 1972, in which you question the extent to which franchising authorities can establish regulations in excess of or different than the regulations established by the Commission in the *Cable Television Report and Order.* I have taken the liberty of combining some of your questions and rephrasing others for purposes of clarity.

1. Q. May a franchising authority in a major television market specify a minimum channel capacity in excess of 20 channels?

   A. In footnote 25 of the *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order,* the Commission stated that while it has preempted the area of channel capacity, it would not foreclose a system from meeting more stringent local requirements . . . *"upon a demonstration of need for such channel capacity and the system's ability to provide it."* (emphasis supplied) Also see paragraph 132 and footnote 70 of the *Cable Television Report and Order.*

2. Q. May a franchising authority outside a major market specify a minimum channel capacity and, if so, can this minimum channel capacity be in excess of what this Commission requires for a major market?

A. Cities outside major markets may specify a minimum channel capacity, but such capacity may not be in excess of what the Commisssion requires for systems in major markets. See Sections 76.251-(b) of the Rules and paragraph 148 of the *Cable Television Report and Order.*

3. Q. May a franchising authority located outside a major television market require a cable system to maintain a plant having the technical capacity for nonvoice return communications?

A. Yes—see Section 76.251(b) of the Commission's Rules and paragraphs 132 and 148 of the *Cable Television Report and Order.*

4. Q. May any franchising authority require a more sophisticated form of return communications?

A. In footnote 25 of the *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order* the Commission stated, "Where a franchising authority *has a plan for actual use* of a more sophisticated two-way capability and the cable operator can demonstrate its feasibility both practically and economically, we will consider, in the certificating process, allowing such equipment." (emphasis supplied)

5. Q. Can a franchising authority require all access services to be made available at no charge?

A. No—The Commission will consider in the certificating process, however, requirements that additional public access channels or some educational channels be offered at no charge or at reduced cost on an experimental basis. See paragraph 132 of the *Cable Television Report and Order.*

6. Q. Can a franchising authority require the franchisee to make available more access channels than those specified by the Commission?

A. No—unless during the certificating process the Commission is shown that such additional channels are necessary and capable of being used according to an existing, viable plan. See Section 76.251 (a)(11)(iv) of the Rules, and paragraph 132 of the *Cable Television Report and Order.*

7. Q. Can a franchising authority require a franchisee to provide access services outside major markets?

A. Yes—but to no greater extent than the Commission requires for systems in major markets. See Section 76.251(b) and paragraphs 132 and 148 of the *Cable Television Report and Order.*

8. Q. May a franchising authority impose a franchise fee based upon revenues derived from "auxiliary" services such as advertising revenues, leased channel revenues, pay cable revenues, etc.?

A. No—Subscriber revenues are considered to be those revenues derived from regular subscriber services—i.e., the carriage of broadcast signals and required non-broadcast services.

9. Q. May a franchising authority insist on a franchise fee higher than 3% if the excess fee is to be used for funding public access services?

A. There is no hard and fast answer to this question at present. Clearly, however, the factors that would bear heavily in the Commission's consideration of any such scheme would include the amount of excess fee, the danger that, through funding, local governments would control public access programming, and the possibility of other alternatives.

10. Q. May a franchising authority require a faster construction schedule than that suggested by the Commission?

A. Yes—See Section 76.31(a)(2) of the Commission's Rules.

11. Q. May a franchising authority require systems with fewer than 3500 subscribers to engage in local origination?

A. The Commission has preempted this field. See paragraph 48, First Report and Order, 20 FCC 2d 201, at 223. See also "Clarification of CATV First Report as to Scope of Federal Pre-emption," 20 FCC 2d 741. Under these circumstances, I believe the Commission would reject such a requirement. Further, the Commission preemption extends to policy concerning any waiver of the origination rule.

12. Q. May a franchising authority establish technical standards in excess of those required by the Commission?

A. Yes—(See paragraph 91 of the *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order*) The Commission will not, however, assume responsibility for enforcement of more stringent technical standards. Local authorities should therefore be prepared to assume the burden of such enforcement.

13. Q. May a franchising authority limit a franchisee to providing services that can be performed only by the franchisee itself?

A. No—Clearly the concept of access services is to offer the benefits of a multiplicity of channels to the public. Thus in Sections 76.251(a)(11) (i) and (iii), system operators are specifically forbidden to exercise control over the program content of public and leased access channels.

The foregoing responses to your questions should indicate the degrees to which the Commission will sanction franchise provisions at variance with its cable regulatory

program. Where variances are sought, as for instance where a franchise calls for extra access channels, greater channel capacity, or a higher franchise fee, detailed showings will be required during the certificating process. If such a showing is inadequate, the Commission will not issue a certificate of compliance.

*It is recommended, therefore, that franchises be drawn to include severability clauses that will enable the Commission to authorize system operations without the delay that might be created by the necessity for franchise amendments.* (Emphasis supplied.)

I hope the foregoing is responsive to your inquiry. If I can be of further assistance to you, do not hesitate to call on me.

# COURT OF APPEALS OF KENTUCKY

**File No. V-63-71**

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CITY OF OWENSBORO, KENTUCKY, ET AL. - *Appellants*

*v.*

TOP VISION CABLE CO. OF KY. - - - - *Appellee*

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APPEAL FROM DAVIESS CIRCUIT COURT
SECOND DIVISION

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## PETITION OF APPELLEE FOR REHEARING

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### STATEMENT OF THE CASE

The Appellee, Top Vision Cable Co. of Ky., (hereinafter referred to as "Top Vision") is a corporation organized under the laws of the Commonwealth of Kentucky. The Appellant, City of Owensboro, Kentucky (hereinafter referred to as the "City"), is a municipal corporation of the State of Kentucky, and the Appellants, Irvin Terrill, Waitman C. Taylor, John D. Miller, John C. Fisher, and Alton Puckett, are members of the Board of Commissioners of Owensboro, the governing body of the City.

On October 22, 1965, the City enacted Ordinance No. 63-65 (R. 17), which authorized the advertising for and the issuance of a CATV franchise within the City. Top Vision made a bid on the franchise, and on December 17, 1965, the City, through its Board of Commissioners, adopted a resolution confirming the issuance of a CATV franchise to Top Vision and granting the franchise to Top Vision under the

terms of a Franchise Agreement, dated December 17, 1965 (R. 24). Under the terms of paragraph 2 of the Agreement (R. 24), Top Vision was obligated to pay the City an annual franchise fee for the privilege of operating the franchise, the fee being equal to 26% of the gross income received by Top Vision from its operation of the CATV system.

As the Court noted in its opinion, Top Vision almost immediately encountered unexpected, unforeseen and severe hardships, wholly beyond its control, in its attempt to complete the construction of the CATV system for the City. These hardships centered around the promulgation by the Federal Communications Commission (FCC) of a rule prohibiting the importation of distant television signals into the top one hundred (100) television markets. Owensboro is located in one of these one hundred largest television markets, the Evansville market.

The City recognized the severe hardship placed on Top Vision by the FCC ruling, and recognized that the FCC rule prohibited the City from achieving its purpose in granting the franchise, to enable the citizens of Owensboro to receive distant television signals within the City. Twice the City granted Top Vision extensions of time in which to complete the CATV system for the expressed purpose of allowing Top Vision to go before the FCC "in an effort to relieve the CATV system in the City of Owensboro from the operation of certain restrictive regulations of said Commission. . . ." (Resolution No. 66-68, granting extension of time for construction of CATV system, R. 36), and City officials wrote letters and made appearances before congressional committees and federal agencies in their attempts to aid Top Vision resolve the problem.

On March 26, 1970, the Court of Appeals for the Sixth Circuit held that ordinances imposing a gross receipts tax on CATV systems were unconstitutional as imposing a burden upon the proceeds from interstate commerce in violation of the Commerce Clause of the Constitution of the

United States. *Wonderland Ventures, Inc.* v. *City of Sandusky, Wonderland Ventures, Inc.* v. *City of Fremont,* 423 F. 2d 548 (6th Cir., 1970). Due to the decision in *Wonderland, supra,* Top Vision attempted to renegotiate the license fee payment with the City on the basis of the cost to the City of the operation of the CATV system by Top Vision. The City unreasonably refused to renegotiate and has continued in its refusal to negotiate up to this point.

On September 22, 1970, Top Vision filed an action in the United States District Court for the Western District of Kentucky for a declaratory judgment against the same parties as are defendants in the instant case, asking that the 26% gross receipts provision of the Franchise Agreement be adjudged unconstitutional under the Commerce Clause of the United States Constitution, pursuant to the rule announced in *Wonderland, supra.* The defendants moved to dismiss that complaint, on the ground that they concurred in Top Vision's position that the 26% gross receipts license fee provision was unconstitutional. Shortly thereafter, the defendants moved to dismiss for lack of jurisdiction, basing their motion on "Resolution No. 56-70" (R. 28), which resolution officially conceded the constitutional invalidity of the 26% gross receipts provision. The federal court then dismissed the case for lack of jurisdiction, since there was no longer any "federal question" involved.

Despite the City's concession of the constitutional invalidity of the 26% gross receipts provision based upon the decision in *Wonderland,* it continued to demand payments under that franchise fee arrangement, now held and conceded to be unconstitutional. Top Vision has stopped making such payments pending the outcome of this action, but from 1965 through August 1970, it paid 26% of its gross revenue to the City pursuant to the illegal terms of the Franchise Agreement. Such payments amounted to over $9,500.00 illegally collected by the City.

This action was filed in the Daviess Circuit Court by Top Vision on December 19, 1970, asking for a declaratory judgment and injunctive relief against the City. Top Vision asked for a declaration that: (1) the City had no authority to require a CATV operation to be franchised; (2) that any charge for the use of the City's right-of-ways must be reasonably related to the cost to the City of such use; (3) that the 26% gross receipts fee provision in the Franchise Agreement, conceded to be unconstitutional, was severable from the remainder of the Agreement, which remains valid; (4) that Top Vision should be granted an additional and sufficient period of time in which to complete the construction of the CATV system. In addition, Top Vision asked the court: (1) to determine a reasonable fee for the use of the City's public right-of-ways; (2) to order the City to refund all monies received by the City pursuant to the unlawful and unconstitutional 26% gross receipts fee provision; and (3) to restrain the City and its officials from treating the Franchise Agreement as null and void and of no legal effect.

On April 6, 1971, the Daviess Circuit Court granted, in part, Top Vision's motion for summary judgment on the basis of the pleadings, the exhibits attached to the pleadings and the memoranda and argument of counsel (R. 39). The court held that paragraph 2 of the Franchise Agreement, the invalid franchise fee provision, was severable from the remainder of the Agreement, which remained valid, and directed the City to renegotiate the payment provisions based upon the burdens imposed or likely to be imposed by the CATV system upon the public ways of the City. The court also granted Top Vision a reasonable time in which to complete construction of the system. In addition, the court held that a CATV system was a suitable subject for a franchise granted by a municipality in Kentucky, and denied Top Vision the right to recover any of the illegal

fees theretofore paid to the City under the terms of paragraph 2 of the Franchise Agreement.

The City appealed from the decision of the Daviess Circuit Court in regard to all its holdings, with the exception of its decision that the municipality had the authority to regulate a CATV business operation by franchise, and its holding that Top Vision was not entitled to a refund of the money paid to the City under the unlawful and unconstitutional fee provision of the Franchise Agreement. Top Vision cross-appealed from these latter decisions of the trial court. The appeal and cross-appeal were consolidated, and on September 22, 1972, this Court rendered judgment reversing the Daviess Circuit Court by ruling that: (1) a CATV business operation was a suitable subject for franchising under the laws of Kentucky; (2) the illegal franchise fee provision in the Franchise Agreement could not be severed from the Agreement, and the invalidity of the fee provision vitiated the entire contract; and (3) Top Vision was entitled to recover the fees previously paid to the City which were illegal and unconstitutional.

## ARGUMENT

### I. The Court Failed to Give Adequate Consideration to the Expressed Intention of the Parties Regarding the Severability of the Gross Receipts Fee Provision From the Remainder of the Franchise Agreement.

In its opinion, this Court recognized that the Franchise Agreement expressly provided that "[i]f any provision of the franchise agreement was declared invalid, such declaration would not affect the remainder of the franchise." (p. 2) But in its later analysis of the severability of the fee provision, the Court completely failed to give any consideration whatsoever to the expressed intention of the parties that should any provision of the Agreement be held

invalid by a court of competent jurisdiction, as was the case here, "such invalidity shall not affect the validity of this grant as a whole, or any part thereof, other than the part declared invalid." (Paragraph 16 of the Franchise Agreement, R. 21)

Whether a contract clause may be severed from the remainder of the contract without affecting the validity of that contract as a whole "involves the ascertainment of the intention of the parties, *which must be deduced from the contract itself.*" *Koppers Co.* v. *Asher Coal Min. Co.,* 226 Ky. 492, 11 S. W. 2d 114, 115 (1928) (Emphasis supplied); *see also, J. S. McHargue* v. *Scott,* Ky., 305 S. W. 2d 929 (1957).

The Court totally disregarded the parties' expressed statement as to the severability of any clause within the Franchise Agreement. Instead, the Court accepted the City's unsupported contention, based on absolutely no evidence whatsoever in the record, that one of the primary purposes of the franchise was to provide revenue to the City, and that the fee provision could not be severed without doing violence to this purpose. By accepting this unsubstantiated statement, the Citur totally disregarded the expressed intention of the parties, as it appeared on the face of the Agreement. There was absolutely no evidence to contradict the clear intention of the parties, as expressed by the contract itself.

Furthermore, in its opinion the Court cited with approval the case of *Ray* v. *City of Owensboro,* Ky., 415 S. W. 2d 77 (1967). As the Court noted, that case, as well as several others, stands for the proposition that "the purpose of the section (Section 163 of the Constitution) was to give the city control of the streets, alleys and public grounds and to make it possible for the city to provide the services of these utilities to its inhabitants." 415 S. W. 2d at 79. There is nothing to indicate that the authority to issue franchises was bestowed on municipalities for any purpose related to the raising of revenue.

> What, therefore, is commonly termed the "granting" of a franchise by a city for one of these public utilities is in the nature of a contract by the city with the grantee for the performance of a public service. . . . *From this view of the subject it will readily be seen that the primary object a city would have, in contracting for or procuring the services of such utilities, is not the revenue to be obtained for the city, but the securing of good and efficient service. . . . Louisville Home Telephone Co.* v. *City of Louisville,* 113 S. W. 855, 861 (1908). (Emphasis supplied)

It is clear that Sections 163 and 164 of the Constitution were enacted solely for the purpose of allowing the City to provide certain essential services to its inhabitants, and not to provide additional sources of revenue for a municipality. The City's statement to the contrary is not only totally unsupported by the evidence, but it also has no basis in law.

## II. The Court Failed to Recognize the Preemption by the Federal Communications Commission of the Question of Franchise Fees for CATV Systems.

Clearly, the erroneous application of Kentucky law to the severability issue, by itself, requires revision of the Court's September 22, 1972 decision.

Perhaps of more serious consequence, however, is the chaos posed for CATV throughout Kentucky by this decision. Chaos, because the decision presumptively invalidates most existing CATV franchises in Kentucky and flies in the face of the preemptive regulation of the franchise aspects of CATV by the United States through the Federal Communications Commission. It must be pointed out to the Court that while the City has made the unsubstantiated allegation that one of its primary purposes in entering into

the Franchise Agreement was to provide revenue for the City, as a result of these FCC regulations, it is no longer legally permissible for a municipality to use a CATV franchise to raise revenue for general municipal purposes.

In the light of several court decisions regarding the constitutionality of gross receipts CATV franchise fees, including *Wonderland Ventures, Inc.* v. *City of Sandusky, supra,* the Federal Communications Commission acted to resolve the issue of what is to be considered an acceptable fee for the grant of a CATV franchise. By so acting this federal regulatory agency preempted the right of a state or local governmental body to negotiate or demand a fee in excess of a small percentage charge in exchange for the right to operate a CATV system.

As of March 31, 1972, the FCC Rules and Regulations dealing with cable television franchises demand that

> [t]he franchise fee must be reasonable (e.g., in the range of 3-5% of the franchisee's gross subscriber revenues per year from cable television operations in the community (including all forms of consideration, such as initial lump sum payments)). P & F RADIO REG. ¶ 85.31 (March 31, 1972)

Simply stated, the federal regulations are such that there is no longer any room for negotiation regarding a fee to be charged by a municipality for a CATV franchise; the FCC's rules are controlling.

The Court failed to recognize and to consider the effect of the FCC's preemption of this area of the law dealing with CATV franchises. The Court's decision that the invalidity of the franchise fee provision invalidated the Franchise Agreement is equivalent to a decision that these new FCC rules and regulations pertaining to franchise fees result in the invalidation of every franchise agreement in Kentucky where the franchise provisions are not in con-

formity with the FCC rules. Surely this is not the intention of this Court.

It is a long and well recognized rule that a contract containing an illegal provision is not void as a whole unless the legislative or regulatory body enacting the law demonstrates an *intention* to invalidate such contracts as a whole.

> A contract in violation of a statutory provision generally is void or illegal only if the legislative body enacting the statute evidences an intention that such contracts be considered void or illegal. See, e.g., McCullough Transfer Co. v. Virginia Sur. Co., 213 F. 2d 440 (6th Cir., 1954); Macco Const. Co. v. Farr, 137 F. 2d 52 (9th Cir. 1943); Guffey-Gillespie Oil Co. v. Wright, 281 F. 787 (8th Cir., 1922); Talco Capital Corp. v. Canaveral Int'l. Corp., 225 F. Supp. 1007 (S. D. Fla. 1964); 17 C.J.S. Contracts § 202 at p. 1007 (1963). Otherwise . . . the contract itself remains in full force and effect.
>
> *Ets-Hokin & Galvin, Inc.* v. *Maas Transport Inc.*, 380 F. 2d 258, 260 (8th Cir., 1967).

The Court simply failed to consider that by the enactment of the above mentioned rules and regulations, the FCC preempted any right the City might have had to raise revenue by the use of such a CATV franchise.

The FCC's purpose to be served by the enactment of these rules and regulations was to "open up cable's potential to the public," *Proposals For Regulation of Cable Television Submitted to Congress by The Federal Communications Commission* (August 5, 1971) not to invalidate all franchises which do not conform to the rules. The FCC reemphasized this purpose in a Letter Ruling, dated August 22, 1972, entitled "Franchise Provisions At Variance With FCC Cable Television Rules," (See Appendix "A") in which it stated

> that franchises (should) be drawn to include severability clauses that will enable the Commission to authorize system operations without the delay that might be created by the necessity for franchise amendment.

The Franchise Agreement in question here has such a severability clause, yet the Court's decision contradicts not only the intention of the parties in this regard, but the stated position of the FCC as well.

The FCC, under its rule making authority, has deprived the City of any authority to raise revenue by the use of CATV franchises. By such action, the FCC did not intend to jeopardize the franchises of every CATV operator. But the Court's decision, as it now stands, does jeopardize every CATV franchise in the state of Kentucky which does not conform to the rules and regulations of the Federal Communications Commission. It is respectfully submitted that the Court failed to adequately consider the vast implications of its decision upon all the holders of CATV franchises in Kentucky, and that such a consideration is essential to a proper decision in this case.

## CONCLUSION

For the reasons stated above, it is respectfully submitted that the decision of this Court reversing the decision of the Daviess Circuit Court is in error and said decision should be reconsidered.

Respectfully submitted,

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MAR 29 1973

MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

No. 72-1186

---

**TOP VISION CABLE CO. OF KY. - - Petitioner**

*versus*

**CITY OF OWENSBORO, KENTUCKY, a Municipal Corporation of the Second Class, and IRVIN TERRILL, Mayor, WAITMAN C. TAYLOR, Commissioner, JOHN D. MILLER, Commissioner, JOHN C. FISHER, Commissioner, ALTON PUCKETT, Commissioner - Respondents**

---

## BRIEF IN OPPOSITION

---

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IN THE

# SUPREME COURT OF THE UNITED STATES

**No. 72-1186**

---

TOP VISION CABLE CO. OF KY. - - *Petitioner*

*v.*

CITY OF OWENSBORO, KENTUCKY, a Municipal Corporation of the Second Class, and IRVIN TERRILL, Mayor, WAITMAN C. TAYLOR, Commissioner, JOHN D. MILLER, Commissioner, JOHN C. FISHER, Commissioner, ALTON PUCKETT, Commissioner - *Respondents*

---

## BRIEF IN OPPOSITION

---

The Respondents respectfully pray that the writ of certiorari to review the judgment and opinion of the Kentucky Court of Appeals rendered September 22, 1972, as prayed for by Petitioner, be denied.

## OPINION BELOW

The opinion of the Kentucky Court of Appeals is reported at 487 Southwestern Second 283.

## JURISDICTION

Title 28 U.S.C. §1257(3) does not invoke this Court's jurisdiction in the instant case.

## QUESTIONS PRESENTED

I. Is the judgment of the United States District Court for the Western District of Kentucky in Civil Action No. 2519 *res judicata* that the complaint in this case presented no federal question?

II. Was a federal question raised below?

III. Was the question here asserted to be a federal question timely raised below?

IV. The judgment herein rests on adequate state grounds.

V. Was Petitioner denied due process of law by the Kentucky Court of Appeals?

## STATUTES, RULES AND ORDINANCES INVOLVED

The following statutes, rules and ordinances are here involved:

(1) Resolution No. 56-70 of the Board of Commissioners of the City of Owensboro, Kentucky—See Appendices, pp. 70-71.

(2) Rules of Court of Appeals (R.C.A.) of Kentucky, 1.240, which is here set out verbatim.

> "The appellant may file a reply brief within 20 days after the appellee's brief is filed. No subsequent briefs will be considered unless filed with leave of Court.
> (Am. Eff. 1-1-63)."

(3) Rules of Court of Appeals (R.C.A.) of Kentucky, 1.350, which is here set out verbatim:

"(a) A party adversely affected by an opinion of the Court in an appealed case may petition the Court for (1) a rehearing, or (2) a modification or extension of the Opinion, or both, and the opposing party may file a response thereto.

(b) Except in extraordinary cases when justice demands it, a petition for rehearing shall be limited to a consideration of the issues argued on the appeal and will be granted only when it appears that the Court has overlooked a material fact in the record, or a controlling statute or decision, or has misconceived the issues presented on the appeal or the law applicable thereto.

(c) When it is desired to point out and have corrected any inaccuracies in statements of law or fact contained in an opinion of the Court, or to extend the opinion to cover matters in issue not discussed therein, and the result reached in the opinion is not questioned, a party may request a modification or extension.

(d) In the event a petition for rehearing is sustained, a party adversely affected by the new opinion may petition for a rehearing, modification or extension under the same Rules governing the original petition for rehearing, modification or extension.

(Am. eff. 7-1-71)"

(4) 47 C.F.R. Sec. 76.31:

"SUBPART C—FEDERAL-STATE/LOCAL REGULATORY RELATIONSHIPS

§ 76.31 Franchise standards.

(a) In order to obtain a certificate of compliance, a proposed or existing cable television sys-

tem shall have a franchise or other appropriate authorization that contains recitations and provisions consistent with the following requirements:

(1) The franchisee's legal, character, financial, technical, and other qualifications, and the adequacy and feasibility of its construction arrangements, have been approved by the franchising authority as part of a full public proceeding affording due process;

(2) The franchisee shall accomplish significant construction within one (1) year after receiving Commission certification, and shall thereafter equitably and reasonably extend energized trunk cable to a substantial percentage of its franchise area each year, such percentage to be determined by the franchising authority;

(3) The initial franchise period and any renewal franchise period shall be of reasonable duration;

(4) The franchising authority has specified or approved the initial rates which the franchisee charges subscribers for installation of equipment and regular subscriber services. No changes in rates charged to subscribers shall be made except as authorized by the franchising authority after an appropriate public proceeding affording due process;

(5) The franchise shall specify procedures for the investigation and resolution of all complaints regarding the quality of service, equipment malfunctions, and similar matters, and shall require that the franchise maintain a local business office or agent for these purposes;

(6) Any modifications of the provisions of this section resulting from amendment by the Commission shall be incorporated into the franchise within one (1) year of adoption of the modification, or at the time of franchise renewal, whichever occurs first.

*Provided, however,* That, in an application for certificate of compliance, consistency with these requirements shall not be expected of a cable television system that was in operation prior to March 31, 1972, until the end of its current franchise period, or March 31, 1977, whichever occurs first.

(b) The franchise fee shall be reasonable (e.g., in the range of 3-5 percent of the franchisee's gross subscriber revenues per year from cable television operations in the community (including all forms of consideration, such as initial lump sum payments)). If the franchise fee exceeds three percent of such revenues, the cable television system shall not receive Commission certification until the reasonableness of the fee is approved by the Commission on showings, by the franchisee, that it will not interfere with the effectuation of federal regulatory goals in the field of cable television, and, by the franchising authority, that it is appropriate in light of the planned local regulatory program. The provisions of this paragraph shall not be effective with respect to a cable television system that was in operation prior to March 31, 1972, until the end of the system's current franchise period, or March 31, 1977, whichever occurs first."

## COUNTERSTATEMENT OF THE CASE

(1) The Petitioner's franchise expired by its own terms. The franchise (see Petition for Certiorari, Franchise Agreement, p. 28) contained this provision:

> ". . . (i)t being understood, as a condition of this franchise, that the construction of such system shall be completed to the extent of making available community antenna service to substantially all the citizens of Owensboro, Kentucky, on or before two years from the date hereof, or this franchise shall be null and void without further notice or further act by the party of the first part. *For cause, in its sole discretion,* the Board of Commissioners of the City of Owensboro, Kentucky, may extend said two (2) year deadline from time to time upon written application for same by the second party at least sixty (60) days prior to said deadline or extension thereof." (Emphasis added.)

(2) Petitioner constructed approximately one-third of the required CATV system within the two-year period.

(3) In two successive extensions of time (the first for one year (and the second for two years) gratuitously granted by the City to Petitioner for the completion of its CATV system, Petitioner made no additions to its system. On December 19, 1970, when Petitioner filed suit in the Daviess Circuit Court, Owensboro, Kentucky—five years after the granting of the franchise, three years after the initial deadline for the completion of the system—Petitioner still claimed only to have constructed a CATV system adequate for

one-third of the citizens of Owensboro, Kentucky (Complaint, Daviess Circuit Court, App. pp. 40-51).

(4) The franchise made the granting of extensions for the completion of the CATV system entirely a discretionary matter with the City, to be exercised only upon written application from the franchise holder ". . . at least sixty (60) days prior to . . ." the deadline for the construction of the system or any extension of such deadline. Petitioner's request for its third extension of time was not made until November 4, 1970, or 14 days beyond the deadline fixed by the contract (Resolution 56-70, App. pp. 70-71).

The City exercised its discretionary legislative power by declining to grant a third extension of time for compliance with the contractual completion date.

(5) The Petitioner recites that the Kentucky Court of Appeals' decision ignored the severability clause of the contract. This is erroneous. The Kentucky Court of Appeals stated:

> "The city further contends that the 26-percent clause cannot be severed from the remainder of the agreement without doing violence to one of the underlying purposes of the franchise, to-wit, to provide revenue to the City, and the elimination of the clause vitiated the contract. This contention, we believe, is sound" (see Petition for Certiorari, p. 17).

(6) The complaint filed by Petitioner in Civil Action No. 2519 in the United States District Court for the Western District of Kentucky presented substan-

tially the same case as is presented by the complaint in this case (App. pp. 15-21). The parties are the same. No appeal was taken from the Memorandum and Order entered November 23, 1970.

## ARGUMENT

### I.

### The Judgment of the United States District Court for the Western District of Kentucky in Civil Action No. 2519 Is *Res Judicata* That the Complaint in the Case Presented No Federal Question.

The complaint in Civil Action No. 2519 in the United States District Court for the Western District of Kentucky (App. pp. 15-21) presented substantially the same case as is presented by the complaint in this case (App. pp. 15-21). The parties there were the same as the parties here. The final judgment in that case (entitled "Memorandum and Order"), entered by the Court on November 23, 1970 (App. pp. 21-24) was that the Court had no jurisdiction because no federal question was presented. The plaintiff there had opportunity to present and press upon the Court any and all federal questions presented by the controversy between the parties, that is, any and all federal questions which were raised by all that had happened before its complaint was filed. Instead, the plaintiff there limited itself to urging the Court to take jurisdiction of questions of state law under the theory of pendent jurisdiction.

There was no appeal from that judgment dismissing the complaint for want of jurisdiction. Petitioner, here, has had, in that case, its day in Court on its claim

that the complaint in this case presents questions of federal law. It is estopped to urge such claim here. See *Partmar Corporation* v. *Paramount Pictures Theatre Corporation,* 349 U. S. 89 (1954); *United States* v. *Moser,* 266 U. S. 236 (1924); *Connelly Foundation* v. *School Dist. of Haverford Tp.,* 326 F. Supp. 241 (D.C., E.D. Pa. 1971); Scott, *Collateral Estoppel* by Judgment, 56 Harv. L. Rev. 1, 7-10 (1942). See also *Catholic Society of Religious and Literary Education* v. *Madison County,* 74 F. 2d 848 (4th Cir. 1935); *Toosigah* v. *United States,* 186 F. 2d 93, 101 (10th Cir. 1950); *Ripperberger* v. *A. C. Allyn & Co., Inc.,* 113 F. 2d 332 (2nd Cir. 1940), cert. den. 311 U. S. 695 (1940).

## II.

### The Question Here Asserted To Be a Federal Question Was Not Timely Raised Below.

Here the FCC Regulations to which Petitioner refers were adopted March 31, 1972. The decision of the Court of Appeals herein was rendered September 22, 1972. Petitioner thus had ample time to seek leave of the court to tender by supplemental brief any contentions it wished to argue with respect to the effect of the Regulations upon its cause. R.C.A. 1.240. Petitioner did not do so. It rested its case on other arguments and sought to raise a federal question only in a Petition for Rehearing filed after this case was decided.

Except in extraordinary cases where justice demands it, under Kentucky law a question not argued

before a decision is rendered, cannot be raised in a Petition for Rehearing. R.C.A. 1.350; *Commonwealth, Dept. of Highways* v. *Thomas,* Ky., 427 S. W. 2d 213 (1967). The failure of the Petitioner to timely raise the question it would here assert, precludes Petitioner from raising it here. *In Re Lamkin,* 355 U. S. 59 (1957); *Ferguson* v. *Georgia,* 365 U. S. 570 (1961); Stern and Gressman, *Supreme Court Practice,* 4th Ed., p. 120.

## III.

### A Federal Question Was Not Raised Below.

The FCC Regulation Petitioner cited to the Kentucky Court of Appeals, 47 C.F.R. Sec. 76.31 (March 31, 1972) (cited by Petitioner as P. & F. Radio Reg. Sec. 85.31 (March 31, 1972)) was not made effective by the FCC with respect to cable television system that were in operation prior to March 31, 1972 until the end of a system's then franchise period or March 31, 1977 whichever occurs first. 47 C.F.R. Sec. 76.31(b). The Regulation would have application to Petitioner's franchise on March 31, 1977. Thus there is no basis for the ingenious contention by the Petitioner that the Kentucky Court of Appeals somehow violated a federal right of the Petitioner by not holding that the noneffective regulation must be looked to in order to find the intention of the parties to the 1965 contract. The Petitioner has not favored the Court with a full explanation of its argument and the writer is unable to clarify it.

FCC Regulations do indeed, as Petitioner observes, control many aspects of a CATV operation. But the Petitioner has raised no federal question by making this observation. It takes no citation of authority, it is submitted, for the fundamental principle that the mere fact that an activity or business is in many ways controlled by a federal statute or regulation, does not make any question that may arise in regard to the business or activity a federal question, as the Petitioner seems to contend. To raise a federal question a litigant must demonstrate that a dispute between him and his adversary will be resolved one way if a construction of a federal measure he advocates is adopted by a court and another way if the construction his adversary advocates is adopted. *Gulley* v. *First Nat. Bank,* 299 U. S. 109 at 112, 113 (1936), and cases there cited.

An examination of the Petition of Appellee for Rehearing in which Petitioner states it raised a federal question, will reveal that the effect of the Petitioner's argument with respect to an FCC Regulation was that: (1) the 26% payment provision of its franchise contract was invalid because of an FCC Regulation, and (2) that such Regulation did not invalidate the entire contract. The first proposition (although inaccurate because as hereinbefore shown the Regulation was not then applicable to the contract) added nothing to Petitioner's case because the City of Owensboro had conceded to the position theretofore advanced by the Petitioner that such payment provision was invalid and unenforceable by virtue of Article I, Sec-

tion 8, Clause III of the Constitution of the United States. Neither did the second argument raise a controversy, federal or otherwise, because the City had never contended and the Court had not held that the franchise contract was invalid because of the FCC Regulation the Petitioner cited. (See Appellant, City of Owensboro's, Response to Appellee's Petition for Rehearing, App. pp. 25-39). Thus, although the Petitioner cited a federal measure, it raised no federal question in the Court below.

## IV.

### The Judgment Herein Rests on Adequate State Grounds.

When Petitioner failed to abide by the construction schedule of its contract, its franchise terminated under Kentucky law. *Davis* v. *City of Bowling Green,* Ky., 289 S. W. 2d 506 (1956).

This ground of invalidity of the Petitioner's franchise was pressed both in the Trial Court and Kentucky Court of Appeals, but the Court of Appeals did not find it necessary to reach this issue. Since that Court might have rested the judgment herein on such state grounds, this Court should not take jurisdiction to review the judgment. *Stembridge* v. *Georgia,* 343 U. S. 541 at 547 (1952).

## V.

### Petitioner's Claim of Lack of Due Process Is Groundless.

The Petitioner claims, in effect, that the rejection of its contentions by the Court of Appeals denied it due process of law. No authority is cited for this proposition. It is clear that mere unsuccess of a litigant, even if a court errs in deciding against him, is not sufficient to disclose a substantial due process question. *American Railway Exp. Co.* v. *Kentucky,* 273 U. S. 269 (1927); *Arrowsmith* v. *Harmoning,* 118 U. S. 194 (1886); 32 Am. Jur. 2d, Federal Practice and Procedure, §52, p. 46.

The principle is too well established to require further argument.

## CONCLUSION

For the reasons herein, the Petition for Certiorari to the Kentucky Court of Appeals should be denied.

Respectfully submitted,

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# UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY

Civil Action No. 2519

---

TOP VISION CABLE, INC., a Kentucky Corporation - *Plaintiff*

*v.*

CITY OF OWENSBORO, KENTUCKY, a Municipal Corporation of the Second Class, and
IRVIN TERRILL, Mayor,
WAITMAN C. TAYLOR, Commissioner,
JOHN D. MILLER, Commissioner,
JOHN C. FISHER, Commissioner,
ALTON PUCKETT, Commissioner - - - *Defendants*

---

## COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

1. This is an action for declaratory judgment as authorized by Section 2201 of Title 28 of the United States Code, and is brought because there is an actual controversy now existing between the parties of the above-entitled action, as to which the Plaintiff seeks the judgment of this Court.

2. The action arises under the Constitution of the United States, Article I, Section 8, Clause III, as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

3. Plaintiff is a corporation organized under the laws of the State of Kentucky. Plaintiff is engaged in providing community antenna television service (CATV) to the public within the corporate limits of the City of Owensboro.

In brief, Plaintiff's business may be described as follows: Signals of nearby and distant television broadcast stations are received off the air by means of a master antenna advantageously located to obtain maximum signal strength and quality. These signals are relayed by means of coaxial cable lines attached to utility poles through amplification equipment to the residences of subscribing members of the public for a fee. The cable is terminated in the home where a connection is made to the subscriber's privately owned television receiver. The subscriber is thus enabled to receive television broadcasts which would not otherwise be available or which would be received with lesser quality.

4. Defendant City of Owensboro is a municipal corporation of the State of Kentucky, and Defendants Irvin Terrill, Waitman C. Taylor, John D. Miller, John C. Fisher and Alton Puckett are the members of the Board of Commissioners, the governing body of the City of Owensboro, Kentucky.

5. On or about October 22, 1965, the Defendant City of Owensboro, by and through its Board of Commissioners, enacted Ordinance Number 63-65, authorizing the advertisement and sale of a CATV franchise within the City of Owensboro. A certified copy of said Ordinance is annexed to this Complaint and is marked "Plaintiff's Exhibit No. 1", and made a part hereof.

6. On or about December 17, 1965, the Defendant City of Owensboro, by and through its Board of Commissioners, adopted Resolution No. 36-65 confirming the sale of the CATV franchise to Plaintiff and granted a CATV franchise to the Plaintiff by way of a "Franchise Agreement", (hereinafter Agreement), described more particularly in and comprising Section 3 of Defendants' Ordinance No. 63-65, referred to hereinabove. Under the terms of the Agreement, Plaintiff must pay to the Defendant an annual gross receipts tax equal to twenty-six percent (26%) of the gross income received by the Plaintiff from all receipts derived

within the City of Owensboro from its CATV system. Certified copies of said resolution and said "Franchise Agreement" are annexed to this Complaint marked "Plaintiff's Exhibit No. 2" and "Plaintiff's Exhibit No. 3", respectively, and made a part hereof.

7. By the terms of the Agreement the Plaintiff's operations must be in accordance with the laws of the United States of America (paragraphs 1 and 7).

8. On March 26, 1970, in the consolidated cases of *Wonderland Ventures, Inc.* v. *City of Sandusky, Wonderland Ventures, Inc.* v. *City of Fremont* (hereinafter *Wonderland*) (not yet reported), the United States Court of Appeals for the Sixth Circuit in a controlling case in this jurisdiction struck down the ordinances enacted by the Defendants. These ordinances attempted to impose a gross receipts tax on the respective CATV systems there involved. As in the instant case, the Fremont ordinance required each CATV applicant to submit a bid based upon a percentage of gross receipts to be paid to the City for units of 1,000 or more subscribers. The ordinance enacted by the City of Fremont imposed precisely the same kind of gross receipts tax as has been imposed by the Defendant upon the Plaintiff. However, the tax therein involved was only 3% of the gross receipts of the CATV system. The *Wonderland* decision is, therefore, most relevant in its application to the instant case. A true copy of the opinion of the Court in this case is annexed to this Complaint and is marked "Plaintiff's Exhibit No. 4" and is made a part hereof.

9. In *Wonderland,* the Court of Appeals held the ordinances of both Sandusky and Fremont invalid, *inter alia,* ". . . because they impose a gross receipts tax upon the proceeds of interstate commerce in violation of the commerce clause of the Constitution of the United States" (at page 5).

10. On or about May 23, 1970, representatives of the Plaintiff appeared before a meeting of the Board of Commissioners of the Defendant City of Owensboro and requested that Section 3 of the Agreement providing for a 26% gross receipts tax be renegotiated; Plaintiff's request was founded upon its experience in operating the Owensboro system. Plaintiff explained that the 26% gross receipts tax payments to the city made it most difficult for the Plaintiff to make its CATV system at Owensboro economically viable. Moreover, Plaintiff stated its view that should it be required to continue remitting said tax, it would necessarily impair the quality of CATV service which the Plaintiff would be capable of providing. In Section 3, Paragraph II of the Owensboro Ordinance (Paragraph II of the Agreement), any impairment in the quality of service conceivably could work a forfeit of the Plaintiff's legal right to the franchise, and all rights inhering therein. It was further stated that it was the considered opinion of Plaintiff that *Wonderland* invalidated the gross receipts tax imposed on the Plaintiff by the Defendant, City of Owensboro.

11. Defendant, City of Owensboro, through its Board of Commissioners has stated its refusal to renegotiate the tax.

12. Therefore, even though the constitutional validity of the 26% gross receipts tax imposed upon Plaintiff's operation is in substantial doubt, efforts to seek a judicial determination by means other than through declaratory judgment places Plaintiff in extreme jeopardy in the following ways:

(a) Defendant City of Owensboro, through its Board of Commissioners has indicated its intention to treat the entire franchise as void should Plaintiff fail to remit the said 26% tax or if it be declared invalid. This means

that Plaintiff would lose its business and most likely the $430,000.00 it has invested thus far in attempting in good faith to provide CATV service to Owensboro.

(b) On information and belief, if the 26% tax is declared invalid and if the provisions relating thereto were determined by the Court to be severable from the remainder of the Franchise, certain reprisals would nevertheless be taken by Defendants against Plaintiff. Plaintiff must complete construction of the entire system by December 20, 1970, unless a further extension of time within which to complete construction is granted by Defendant. The Plaintiff on information and belief expects that the Defendants would not permit any additional extensions of time within which to complete the construction of the entire system, thus rendering all of Plaintiff's right forfeited. The inequity of this situation and Plaintiff's dilemma will be apparent to this Court since in large part it is the existence of the 26% tax which not only makes existing operation most difficult but has rendered it virtually impossible to attract the additional capital necessary to complete construction of the system. Plaintiff may not decline to pay the tax nor may it litigate the lawfulness of the tax without loss of its franchise and most if not all of its investment in the CATV system.

13. Therefore, absent the availability of a declaratory judgment procedure and injunctive relief, Plaintiff is effectively foreclosed from seeking judicial review to ameliorate the deleterious effects of the burdensome 26% gross receipts tax in view of Defendants' position which threatens Plaintiff with economic extinction, and is foreclosed from seeking a judicial determination of the lawfulness under the Constitution of the United States of said tax.

14. Plaintiff is willing to pay a lawful and reasonable fee to the Defendant to defray costs which Defendant may

incur relative to the use of the rights of way by Defendant and the privileges granted in the Agreement, and in regulating the operations of Plaintiff. Plaintiff believes a fee so determined to be lawful.

WHEREFORE, Plaintiff prays:

1. Judgment of this Court whether or not Section 3, Paragraph 2 of Defendant's Ordinance 63-65, referred to previously and incorporated and made a part herein, is constitutional under Article I, Section 8, Clause 3 of the Constitutiton of the United States.

2. Should said Section 3, Paragraph 2 of Ordinance 63-65 be determined unconstitutional, and the payment of the gross receipts tax imposed therein is thereby judged contrary to law, judgment of this Court whether or not such Section 3, Paragraph 2 is severable from the remainder of Ordinance 63-65, thereby preserving said remainder's validity.

3. Should said Section 3, Paragraph 2 of Ordinance 63-65 be determined unconstitutional, and the payment of the gross receipts tax imposed therein is thereby judged contrary to law, and that such Section 3, Paragraph 2 is not severable from the remainder of Ordinance 63-65, that this Court determine a lawful fee to be paid Defendant by Plaintiff consistent with Article I, Section 8, Clause III of the Constitution of the United States.

4. Should said Section 3, Paragraph 2 be determined to be so severable, that the Defendant City of Owensboro and all officers thereof and their successors be restrained from treating the remaining valid part of said Ordinance as null and void and of no legal effect; from preventing or attempting to prevent Plaintiff from operating its proposed CATV system for the purpose of providing service to the citizens of Owensboro by withdrawing said franchise, or

otherwise taking reprisals against Plaintiff as a result of its seeking this judicial determination.

McKinley and Howard
By (s) Joseph H. McKinley
100 St. Ann Building
Owensboro, Kentucky

E. Stratford Smith
Smith, Pepper, Shack & L'Heureux
1776 K Street, N.W.
Washington, D.C. 20006
Attorneys for Plaintiff

Exhibits attached to this complaint are omitted.

**MEMORANDUM AND ORDER**—Entered Nov. 23, 1970

In October, 1965, the Board of Commissioners of the City of Owensboro, Kentucky, enacted Ordinance No. 63-65 empowering the City Manager of Owensboro to advertise and sell "a franchise authorizing the purchaser thereof to use the public ways, streets, highways, bridges or public places of the City of Owensboro, Kentucky, for the purpose of supplying community antenna television and audio television and radio signals to the public". Consideration for the franchise was to be a sum equal to the cost of advertising and selling the franchise, plus a percentage of the purchaser's gross income derived from within the City of Owensboro. Plaintiff, a Kentucky Corporation, obtained the franchise with a bid of 26% of its gross income. The original contract between the parties called for substantial completion of the CATV system within two years. However, on written application of plaintiff, the City extended the completion date to December 20, 1970.

Early in 1970 the Court of Appeals for the Sixth Circuit held that two ordinances substantially similar to the

Owensboro Ordinance were unconstitutional because they imposed a gross receipts tax upon proceeds from interstate commerce. Wonderland Ventures, Inc. v. City of Sandusky, Wonderland Ventures, Inc. v. City of Fremont, 423 F. 2d 548 (6th Cir. 1970). Thereafter, plaintiff filed an action in this Court seeking a declaration that Ordinance 63-65 is unconstitutional and a determination of the rights and liabilities of the parties under the 1965 agreement.

On November 6, 1970, the Board of Commissioners of the City of Owensboro approved Resolution No. 56-70 wherein it was conceded that the provision of Ordinance No. 63-65 calling for payment to the City of a certain percentage of the franchise purchaser's gross income "is invalid and unenforceable under Article I, Section 8, Clause III of the Constitution of the United States". Defendants have now filed a motion to dismiss the complaint for lack of jurisdiction over the subject matter on the ground that there is no disagreement between the parties regarding the only federal question raised by the complaint. In its response to the motion to dismiss plaintiff urges us to declare Ordinance No. 63-65 unconstitutional and to reach the questions of Kentucky law under the theory of pendent jurisdiction.

Section 2201 of Title 28, United States Code, requires that in every suit for a declaratory judgment an *actual controversy* exist between the parties. In this section the term "controversy" is used in its constitutional sense. U. S. Const. Art. III, §2, cl. 1; Public Service Commission of Utah v. Wycoff Co., Inc., 344 U. S. 237 (1952); Muller v. Olin Mathieson Chemical Corp., 404 F. 2d 501 (2nd Cir. 1968). It is hornbook law that a federal court has no power to hear claims that do not satisfy the "case or controversy" requirement of the Constitution. United Public Workers of America (C.I.O.) v. Mitchell, 330 U. S. 75 (1947); Muskrat v. United States, 219 U. S. 346 (1911). If for any

reason a federal court lacks jurisdiction to hear the only federal claim before it, absent diversity of citizenship it cannot reach other questions of state law raised by the complaint. United Mine Workers of America v. Gibbs, 383 U. S. 715 (1966); California Water Service Co. v. Redding, 304 U. S. 252 (1938).

Questions regarding the "case or controversy" requirement most commonly arise when the facts indicate that the *interests* of the parties are not sufficiently adverse. Usually it is clear from the pleadings that the parties disagree on some point of law. In the case at bar, curiously enough, the usual situation is reversed. While the pleadings and motions clearly indicate that the interests of the parties are adverse, both sides apparently are in complete agreement regarding the only federal question raised.

Counsel have cited no cases directly on point in their supporting memoranda, and we also have been unable to find any. However, after careful consideration, we have concluded that neither the framers of the Constitution nor the Congress could have intended us to rule on a question of constitutional law concerning which no disagreement exists between the parties, merely for the purpose of reaching additional state law questions under the theory of pendent jurisdiction. State issues predominate in this case, and we think that their resolution should be left to the courts of Kentucky. Accordingly, we hold that no actual controversy exists between the parties as to the only federal question raised by the complaint, and that therefore we lack jurisdiction to rule on both the constitutionality of Ordinance No. 63-65 and on the rights and liabilities of the parties under Kentucky law.

In view of our disposition of this case it is unnecessary to rule on defendants' motion to dismiss for failure to state a claim upon which relief can be granted. Defendants' mo-

tion to dismiss for lack of jurisdiction over the subject matter is SUSTAINED.

November 19, 1970

(s) James F. Gordon
United States District Judge

Copies to:

Hon. Joseph H. McKinley
Hon. E. Stratford Smith
Hon. Hugh D. Moore
11-23-70

# COURT OF APPEALS OF KENTUCKY

**File No. V-63-71**

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CITY OF OWENSBORO, KENTUCKY, ET AL. - *Appellants*

*v.*

TOP VISION CABLE CO. OF KY. - - - - *Appellee*

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APPEAL FROM DAVIESS CIRCUIT COURT
SECOND DIVISION

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## APPELLANT, CITY OF OWENSBORO'S, RESPONSE TO APPELLEE'S PETITION FOR REHEARING

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### APPELLANT'S COUNTERSTATEMENT OF QUESTIONS PRESENTED ON APPELLEE'S PETITION FOR REHEARING

1. Did the Court overlook a material fact or a controlling statute or decision, or misconstrue the issue, in holding that the voiding of Top Vision's obligation to pay its bid of 26% of its CATV gross receipts vitiated the franchise despite the severability clause contained therein?

2. Did the Court overlook a material statute or regulation in failing to consider the effect of the Federal Communications Commission Regulations of March 31, 1972, in deciding the intent of the City of Owensboro and Top Vision in executing the December 17, 1965, franchise contract?

## COUNTERSTATEMENT OF THE CASE

### Nothing in Appellee's Statement of Case Requires a Rehearing

Appellee's Statement of the Case contains no showing that Appellee is entitled to a rehearing. Nothing is stated to show that this Court "overlooked a material fact in the record or a controlling statute or decision . . ." or that Your Honors ". . . misconceived the issues presented under the appeal or the law applicable thereto." R.C.A. 1.350.

### Appellee Repeats Statement on Original Appeal, Omitting Facts Fatal to Its Claims

The Statement of the Case in the Petititon for Rehearing is addressed to the issues on the original appeal, rather than to the issues now before the Court. It is simply a repeat—largely en haec verba—of the Counterstatement of the Case contained at pages 1-10 of Appellee's original brief. In common with such original Counterstatement of the Case, it omits many vital record facts, including these facts which are *fatal* to Appellee's case:

1. As an express condition of the franchise, Appellee was required to complete its CATV system ". . . to the extent of making available community antenna service to substantially all the citizens of Owensboro, Kentucky, on or before two (2) years from the date . . ." of the franchise, December 17, 1965, or the ". . . franchise shall be and become null and void without notice or further act of the Party of the First Part" (R. 26).

2. Appellee conceded that it had only constructed approximately one-third of the required CATV system within the two year period (R. 35).

3. In two successive extensions (the first for one year, and the second for two years) gratuitously granted by the City to Appellee for the completion of its CATV system,

Appellee made no additions to its system. On December 19, 1970, when Top Vision filed this suit—five years after the granting of the franchise, three years after the initial deadline for the completion of the system,—Top Vision still claimed only to have constructed a CATV system adequate for one-third of the citizens of Owensboro (R. 8).

4. The franchise made the granting of extensions for the completion of the CATV system entirely a discretionary matter with the City, to be exercised only upon written application from the franchise holder ". . . at least sixty days (60) prior to . . ." the deadline for the construction of the system or any extension of such deadline. (Appellee's request for its third extension of time was not made until November 4, 1970, or 14 days after the deadline fixed by the contract R. 28).

The City exercised its discretionary legislative power by declining to grant a third extension of time for compliance with the contractual completion date (R. 28-29).

5. Appellee was selected as the highest and best bidder at the public auction of the CATV franchise solely because of its bid to pay the City 26% of the gross receipts of the CATV business. All other terms and conditions of the franchise offered by the City were fixed in the franchise ordinance; competition between bidders was limited solely to the percentage of gross receipts which the bidder was willing to pay to the City (R. 18).

The City of Owensboro respectfully refers the Court to pages 1-11 of its original brief for its Statement of the Case on the issues presented in the original appeal.

## City of Owensboro Accepts Statement of Facts in Court's Opinion

The City accepts the statement contained in the Court's opinion, pages 18 to 20 of the Appendix to the Petition for Rehearing, as a fair and full statement of the case presented on the original appeal, noting only that the Court decided

the case before reaching the issue of Top Vision's failure to complete its CATV system within the contract term as extended.[1]

Issues Now Pending

The issues now before the Court for decision are: (1) Did the Court overlook a material fact or a controlling statute or decision, or misconstrue the issue in holding that the voiding of Top Vision's obligation to pay its bid of 26% of its CATV gross receipts vitiated the franchise contract, despite the severability clause contained therein? and (2) Did this Court overlook a material statute or regulation in failing to consider the effect of the Federal Communication Commission's regulations which became effective on March 31, 1972, in deciding the intent of the City of Owensboro and Top Vision in executing the December 17, 1965 franchise contract?

The facts with respect to each of these issues will be taken up in the City's argument of the issues.

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[1]Top Vision concedes its default in this respect. Its effort to escape this default by estoppel against the City is untenable. *Maryland Casualty Co.* v. *Magoffin, etc.*, Ky., 358 S. W. 2d 353 (1962), *Continental Illinois, etc.* v. *City of Middlesboro*, Ky., 109 F. 2d 961 (6th Cir., 1940), and cases there cited.

## ARGUMENT

### THE COURT DID NOT OVERLOOK A MATERIAL FACT OR A CONTROLLING STATUTE OR DECISION OR MISCONSTRUE THE ISSUE IN HOLDING THAT THE VOIDING OF TOP VISION'S OBLIGATION TO PAY ITS BID OF 26% OF ITS CATV GROSS RECEIPTS VITIATED THE FRANCHISE DESPITE THE SEVERABILITY CLAUSE CONTAINED THEREIN

Top Vision argues that the severability clause in the franchise requires a holding that the parties intended that the promise of Top Vision to pay 26% of its gross proceeds to the City may be severed from the franchise and yet leave the franchise in full force and effect.

The Court did not overlook the severability clause or the law applicable to it; nor did it misconstrue the issue. Indeed, Top Vision only claims that the Court "failed to give adequate consideration" to it (Appellee's Pet. for Reh., pp. 6-7).

The effect of the invalidation of Top Vision's covenant to pay the 26% of gross receipts in fee upon the remainder of the franchise contract was hotly argued in the original briefs (Appellant's Brief, pp. 18-28; Appellee's Brief, pp. 15-18). The Court's Opinion evidences its careful consideration of the issue. It recited the substance of the severability clause as a part of its review of all of the clauses in the contract (Appendix to Pet. for Reh., pp. 18-19). It resolved this issue against Top Vision in this language:

> "The city further contends that the 26-percent clause cannot be severed from the remainder of the agreement without doing violence to one of the underlying purposes of the franchise, to-wit, to provide revenue for the city, and the elimination of the clause vitiated the contract. This contention, we believe, is sound."

The City respectfully refers Your Honors to pages 18 to 28 of its original brief for a full treatment of this issue. It asks indulgence in a short additional statement.

## The Severability Clause is Part of the Entire Contract, Which Must be Construed as a Whole

The severability clause in the franchise is only one of many clauses in the contract between the City and Top Vision. This contract must be construed as a whole, and enforced in accordance with the intent of the parties as gathered from the language used, the subject matter, the parties' situation, and the conditions under which the contract was written. *L & N* v. *Joseph,* Ky. 1944, 183 S. W. 2d 953, *Reese* v. *Greenlee,* Ky. 1948, 214 S. W. 2d 262.

## Test of Severability

The severability test is stated in *Asher, supra,* cited by Top Vision, as follows:

> "The usual test of severability is whether the consideration is so segregated that it may be separately applied to each independent covenant in the Contract." 11 S. W. 2d 114, 115.

Am. Jur. defines a "divisible" contract as follows:

> "On the other hand, a 'divisible contract,' using that term correctly, is one contract and not several. It differs from other contracts, ordinarily, in one respect only—that on performance by one side of each of its successive divisions the party becomes liable for his performance of that division. In other words, a 'divisible contract' is one the performance of which is divided into different groups, each set embracing performances which are the agreed exchange for each other." 17 Am Jur 2d Contracts, Sec. 324, p. 757.

**Top Vision's Promise to Pay 26%, Being Illegal, Voids the Contract**

It is an unquestioned principle of law that if an important part of the consideration for an indivisible contract is illegal, the contract is invalid. *Johnson* v. *McMillan,* 178 Ky. 707, 199 S. W. 1070 (1918); *Newport Rolling Co.* v. *Hall,* 147 Ky. 598, 144 S. W. 760 (1912); 17 Am Jur 2d, Contracts, Sec. 231, p. 612; Re-Statement of the Law, Contracts, Vol. 2, p. 1124 (1932).

A severability clause is but an aid to the construction of a contract. As stated in 13 A C.J.S. Sec. 1335, page 313:

> "However, a declaration in the contract that is divisible is but an aid to construction and will not justify a court in declaring a clause divisible when in considering an entire contract, it obviously is not."

In *Dorchy* v. *Kansas,* 264 U. S. 287, 44 S. Ct. 323, 68 L. Ed. 686 (1923), the Supreme Court considered the effect of a severability clause in a Kansas statute, one portion of which had been declared unconstitutional. In determining the intent of the legislature, Mr. Justice Brandeis said:

> "Section 28 of the Act (the severability clause) provides a rule of construction which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command." 68 L. Ed. at 690.

The Supreme Court sent the case back to the Kansas Court for a determination of whether Section 19 of the Act then under consideration ". . . is so interwoven with the system (of compulsory arbitration) that the section cannot stand alone."

Subject to the limitations imposed on cities by Sec. 164 of the Kentucky Constitution, the city agrees with Top Vision's statement that "whether a contract clause may be severed from the remainder of the contract without affect-

ing the validity of that contract as a whole 'involves an ascertainment of the intention of the parties, which must be deduced from the contract itself (*Koppers Co.* v. *Asher Coal Min. Co.*, 226 Ky. 492, 11 S. W. 2d 114, 115)'". (Appellee's Pet. for Reh., p. 7). The City of Owensboro—Top Vision franchise contract contains an abundance of evidence that the parties did not intend that the franchise should remain valid, even though Top Vision was relieved of its obligation to pay its bid price of 26% of its gross receipts.

### There Were No Divisions of Performance

The franchise contained no divisions of performance by Top Vision which could be set opposite items of performance due from the City. This being the case, the obligation of Top Vision to pay the City 26% of the gross proceeds from its franchised operations was not intended by the parties to be a divisible undertaking.

### Kentucky Constitution Requires Franchise be Let to Highest and Best Bidder

The City and Top Vision entered into this franchise contract under the mandate of Section 164 of the Kentucky Constitution, which provides that:

> "Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder . . ."

Both parties thus knew that the City had no power to negotiate the consideration which should be paid for the franchise, and that this had to be fixed by public bidding.

### Franchise Was Awarded to Top Vision Entirely on Basis of Its 26% Bid

The franchise advertised and sold by the City fixed all of the terms and conditions of the franchise, leaving blank

only the percent of gross receipts which should be paid by the successful bidder. Thus, only the consideration to be paid was submitted to competitive bidding and Top Vision was awarded the contract solely because of its bid of 26% of its gross receipts. Since this 26% covenant was the sole basis for the award to Top Vision, the striking of this clause removes the entire basis of the agreement between the parties.

### The Size of Top Vision's Bid is Significant

The amount bid by Top Vision is in itself significant. The Court has had municipally granted franchises before it on many occasions; it will be taxed to recall any franchise sold at a price as high as that bid by Top Vision. Neither the Board of Commissioners of the City of Owensboro nor the bidder could have regarded this bid as a nominal consideration, or as anything other than an important source of revenue to the City and a heavy burden to the bidder. Indeed, Top Vision alleged that the existence of the 26% provision "made it virtually impossible for the plaintiff to attract either outside equity or working capital from investors. . . ." (R. 8).

### City Required to Consider Revenue to be Raised by Franchise Grant

Top Vision errs in arguing that "there is nothing to indicate that the authority to issue franchises was bestowed upon municipalities for any purpose relating to the raising of revenue" (Appellee's Pet. for Reh., p. 8).

The Kentucky Constitution affords a short answer to Top Vision's argument. Section 164 requires the sale of a franchise to be the "highest" as well as the "best" bidder.

*Kentucky Utilities Co.* v. *Board of Commissioners of the City of Paris*, 254 Ky. 527, 71 S. W. 2d 1024 (1934), in considering the reasons back of the twenty-year limitation on franchises, emphasized the city's interest in revenues to be derived from a franchise sale:

"A reading of the Constitutional Debates reveals that the main purpose behind this section 164 was to insure that every so often the municipality should have the opportunity of revising the terms of the franchise which it had granted as to rates, quality, service, and the like, *and to have the advantage of obtaining from time to time for the franchise its value which most likely would be enhanced by the growth* of population and business. Thus, in the case of Hilliard v. George C. Fetter Lighting & Heating Co., 127 Ky. 95, 105 S. W. 115, 118, 31 Ky. Law Rep. 1330, Judge Carroll, himself a member of the Constitutional Convention of 1890, speaking for the court on this point, said:

'Further illustrating the intention of the section, the limitation of 20 years upon the time for which franchises might be granted was added, as what would be an adequate price for a franchise granted to a public utility corporation to use the streets of a city today might be a mere pittance 20 years hence. The value to the owners of the right granted would keep pace with the growth, wealth, and population of the city, and unless at some future time the city had *the right to obtain additional compensation* for the privilege it would give the grantees of the franchise undue advantage, and *deny to the city the right to exact a consideration* in keeping with the value of the privilege bestowed.'" (Emphasis added).

Other Clauses in Contract Show Severability Clause Doesn't Preserve Franchise When Vital Part Is Invalidated

Many other clauses in the franchise agreement show that the severability clause is "not an inexorable command", but is a rule of construction which this Court properly applied to the Owensboro-Top Vision contract. For

example, the term of the franchise is fixed at 15 years. Suppose this term should be held invalid, or should be reduced to 3 years. Despite the severability clause, Top Vision would not be required to construct a CATV system for the entire city. The parties intended a grant of a term adequate to make construction of the system economically feasible. The term of the contract is thus so vital and so interwoven with other covenants of the contract that it cannot be stricken without destroying the contract.

But suppose that the covenant in the franchise requiring Top Vision to provide one free drop to each parochial school passed by the CATV cable is declared invalid. A proper construction of the contract would require that this covenant be severed from the remainder of the franchise. Parochial schools are only one of a number of public buildings to which free drops must be supplied; the amount involved in the covenant with respect to parochial schools is small; it was not an item considered by the City in determining who should be the successful bidder; and its presence in the contract is not required by any constitutional section.

To accept Top Vision's argument that the severability clause alone is determinative of the intention of the parties leads to the absurd conclusion that all of Top Vision's obligations under the contract could be severed without invalidating Top Vision's franchise, i.e. leaving Top Vision with all of the benefits with none of the burdens.

The 26% covenant is such an important part of the franchise and is so interwoven with the franchise that the parties did not intend that the franchise should survive the striking of the 26% covenant. This Court was thus correct in ruling that ". . . the 26-percent clause cannot be severed from the remainder of the agreement without doing violence to one of the underlying purposes of the franchise, to-wit, to provide revenue to the City, and the elimination of the clause vitiated the contract."

## THIS COURT DID NOT OVERLOOK A MATERIAL STATUTE OR REGULATION IN FAILING TO CONSIDER THE FEDERAL COMMUNICATIONS COMMISSION'S 1972 REGULATIONS IN DECIDING THE INTENT OF THE CITY OF OWENSBORO AND TOP VISION IN EXECUTING THE DECEMBER 17, 1965 FRANCHISE AGREEMENT

Appellee argues that it is entitled to a rehearing because the Court did not consider the effect of the Federal Communications Commission's regulations which became effective on March 31, 1972; that under these regulations "(i)t is no longer legally permissible for a municipality to use a CATV franchise to raise revenue for general municipal purposes", and that this Court's decision "presumptively invalidates most existing CATV franchises in Kentucky" (Pet. Reh. pp. 9-10).

These arguments are fallacious.

### 26% Fee Fell Under Wonderland v. Sandusky, and Not Under FCC Regulations

The City of Owensboro and Top Vision agreed that Top Vision's 26% CATV franchise fee covenant "is invalid and unenforceable under Article I, Section 8, Clause III, of the Constitution of the United States" as construed in *Wonderland Ventures, Inc.* v. *City of Sandusky*, 423 F. 2d 548 (6th Cir. 1970) (R. 31), which held such a covenant to be an unlawful burden on interstate commerce. This agreement was the basis of the dismissal of Top Vision's suit against the City of Owensboro in the United States District Court for the Western District of Kentucky (R. 30-33). Thus, Top Vision's 26% covenant was not invalidated under any FCC regulation.

### Invalidation of Franchise Based on Construction of the Contract and Not on FCC Regulations

This Court's decision that Top Vision's franchise falls with the voiding of the 26% of gross profits franchise fee

covenant is based upon the intention of the parties as expressed in the December 17, 1965 franchise contract. The FCC regulation which went into effect on March 31, 1972, as quoted by Top Vision's brief at page 10 of its Petition for Re-hearing, casts no light on the intention of the City of Owensboro and Top Vision as expressed in their 1965 contract.

### FCC Regulations Do Not Forbid Use of CATV Fees for General Municipal Purposes

Appellee mis-states the facts in saying that under the 1972 FCC regulations "(i)t is no longer legally permissible for a municipality to use a CATV franchise to raise revenue for general municipal purposes". No such prohibition is contained at any place in these regulations 76 C.F.R. 1-617. These regulations require only that CATV franchise fees "be reasonable" and suggest 3% to 5% of gross receipts as a reasonable range (App. Pet. for Re-hearing, p. 10). While this range is much less than the 26% bid in 1965 by Top Vision, the granting of CATV franchises remains a lucrative source of municipal revenue, as will be apparent when the Court compares 3% to 5% of gross receipts with the fees provided in other franchises coming before it.

### Neither This Opinion Nor the 1972 FCC Regulations Pose Any "Chaos" for Kentucky CATV

Top Vision is not warranted in arguing—entirely outside the record—that this decision (coupled with the 1972 FCC regulations) poses "chaos . . . for CATV throughout Kentucky" or "presumptively invalidates most existing CATV franchises in Kentucky."

As we have shown, this decision is not based on the FCC regulations, but upon the *Wonderland* decision, and this Court's construction of the terms and conditions of the particular contract between the City of Owensboro and Top Vision. It is sheer speculation to forecast what intention

may be attributable to parties to other CATV franchise agreements which are not before the Court.

The current Television Fact Book (recognized by the City of Owensboro and Top Vision as authoritative in Paragraph 10 of the franchise between them, R. 20), Services Volume 1972-1973, Edition No. 42, pp. 465a to 473a lists a total of 54 CATV systems in Kentucky for which franchise fee information is published. Only one of these franchise fees is shown as exceeding 5% of gross receipts—the exception being the franchise in Paris, Kentucky, which calls for a fee of 5.6% of gross receipts.

An existing CATV system is not required to comply with FCC regulations affecting franchise fees until March 31, 1977, or the renewal of the franchise, whichever occurs first (76 CFR 31(b)).

Section 7 of these regulations also provides liberal relief for hardship cases:

> "(a) Upon petition by a cable television system, an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to cable television systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question." 76 CFR 7(a).

Top Vision is shaking scarecrows at the Court.

## CONCLUSION

The Petition for Rehearing should be denied.

Respectfully submitted,

HUGH D. MOORE
RICHARD D. GILLIAM, JR.
GILLIAM & MOORE
324 St. Ann Street
Owensboro, Kentucky 42301

*Attorneys for Appellant,*
*City of Owensboro, Kentucky*

## APPENDIX "A"

# THE COMMONWEALTH OF KENTUCKY

DAVIESS CIRCUIT COURT
DIVISION II

No. 13298

TOP VISION CABLE CO. OF KY., a Kentucky Corporation - - - - - - - - - *Plaintiff*

*v.*

CITY OF OWENSBORO, KENTUCKY, a Municipal Corporation of the Second Class, and
IRVIN TERRILL, Mayor,
WAITMAN C. TAYLOR, Commissioner,
JOHN D. MILLER, Commissioner,
JOHN C. FISHER, Commissioner,
ALTON PUCKETT, Commissioner - - - *Defendants*

BE IT REMEMBERED, That heretofore to-wit, on the 19th day of December, 1970, came the plaintiff, Top Vision Cable Co. of Ky., a Kentucky corporation, by counsel, and filed its Complaint for Declaratory Judgment and Injunctive Relief herein, which is in words and figures as follows, to-wit:

## COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

1. This is an action for declaratory judgment as authorized by Section 418.045 of the *Kentucky Revised Statutes*, and is brought because there is an actual controversy now existing between the parties of the above-entitled ac-

tion, as to which the Plaintiff seeks the judgment of this Court.

2. This action arises under the provisions of a certain Franchise Agreement, (hereinafter Franchise Agreement), existing between the Plaintiff and the City of Owensboro, *et al.* (hereinafter Defendants).

3. Plaintiff is a corporation organized under the laws of the State of Kentucky. Plaintiff is engaged in providing community antenna television service (CATV) to the public within the corporate limits of the City of Owensboro. In brief, Plaintiff's business may be described as follows: The signals of nearby and distant television broadcast stations are received off the air by means of a master antenna advantageously located to obtain maximum signal strength and quality. By means of coaxial cable lines attached to utility poles, these signals are relayed through amplification equipment to the residences of subscribing members of the public for a nominal monthly fee. The cable is terminated in the home where a connection is made to the subscriber's privately owned television receiver. The subscriber is thus able to receive television broadcasts which would not otherwise be available or which would be received with lesser quality.

4. Defendant City of Owensboro, Kentucky is a municipal corporation of the State of Kentucky and Defendants Irvin Terrill, Waitman C. Taylor, John D. Miller, John C. Fisher, and Alton Puckett are the members of the Board of Commissioners, the governing body of the City of Owensboro, Kentucky.

5. On or about October 22, 1965, the Defendant City of Owensboro, by and through its Board of Commissioners, enacted Ordinance No. 63-65, authorizing the advertisement and issuance of a CATV franchise within the City of Owensboro. A copy of said Ordinance is annexed to this Complaint and is marked "Plaintiff's Exhibit No. 1", and made a part hereof.

6. On or about December 17, 1965, the Defendant City of Owensboro, by and through its Board of Commissioners, adopted Resolution No. 36-65 confirming the issuance of the CATV franchise to Plaintiff and granted a CATV franchise to the Plaintiff under the terms of the Franchise Agreement described hereinabove. Under the terms of the Agreement, Plaintiff must pay to the Defendants an annual gross receipts tax equal to twenty-six percent (26%) of the gross income received by the Plaintiff from all receipts derived within the City of Owensboro from its CATV system. Copies of said Resolution and said Franchise Agreement are annexed to this Complaint, marked "Plaintiff's Exhibit No. 2" and "Plaintiff's Exhibit No. 3", respectively, and made a part hereof.

7. By the terms of the Franchise Agreement, the Plaintiff's operations must be in accordance with the laws of the United States of America (See Paras. 1 and 7 thereof).

8. On March 26, 1970, in the consolidated cases of *Wonderland Ventures, Inc.* v. *City of Sandusky, Wonderland Ventures, Inc.* v. *City of Fremont,* 423 F. 2d 548 (6th Cir. 1970), (hereinafter Wonderland), the United States Court of Appeals for the Sixth Circuit (which includes Owensboro) struck down the ordinances enacted by the defendant cities imposing a gross receipts tax on the respective CATV systems there involved.

9. In *Wonderland,* the Court of Appeals held the ordinances of both Sandusky and Fremont invalid, *inter alia,* ". . . because they imposed a gross receipts tax upon the proceeds of interstate commerce in violation of the Commerce Clause of the Constitution of the United States. On several occasions following this decision Plaintiff sought to re-negotiate the percent of gross receipts payment with Defendants to reflect compensation to the City of Owensboro on the basis of a fee covering the cost of the Defendant City of the use by Plaintiff of the public right of ways

within the City of Owensboro. Defendants refused and still refuse to negotiate in any manner whatsoever. Nevertheless, on August 31, 1970, some five months after the decision in *Wonderland,* the City of Owensboro accepted a payment of $2,241.47, which amount represented full payment of 26% of the gross receipts of Top Vision then due for the preceding six months, ended June 30, 1970.

10. On September 22, 1970, Plaintiff filed an action for a declaratory judgment in the United States District Court for the Western District of Kentucky at Owensboro, naming as defendants therein the same defendants as are designated herein, and asking that the 26% gross receipts tax provision of the Franchise Agreement be adjudged unconstitutional under Article I, *Section* 8, Clause 3 of the Constitution of the United States (hereinafter "Interstate Commerce Clause") and the authority of the *Wonderland* decision. The defendants therein answered plaintiff's complaint with a "Motion to Dismiss', filed October 22, 1970, and for the first time gave notice to Plaintiff of defendants' agreement with Plaintiff's position that the 26% gross receipts tax provision was unconstitutional under the Interstate Commerce Clause and the *Wonderland* decision.

11. Subsequently defendants, City of Owensboro, *et. al.,* filed a further pleading entitled "Reply to Response of Plaintiff To Defendant's Motion to Dismiss For Lack of Jurisdiction and Failure to State Facts Upon Which Relief Can Be Granted", attaching to this further response a copy of a certain "Resolution No. 56-70". Said Resolution is annexed to this Complaint, marked "Plaintiff's Exhibit No. 4" and made a part hereof. This Resolution, enacted subsequent to the Plaintiff's initiation of the declaratory judgment action, officially conceded the constitutional invalidity of the 26% gross receipts tax provision under the Interstate Commerce Clause. As is pointed out hereinafter in said Resolution the defendants simultaneously refused Plaintiff's pending request for an extension of time within

which to complete construction of the system. Whereupon, based upon the apparent agreement between the plaintiff and the defendants in that proceeding respecting the invalidity of the 26% gross receipts tax provision, the Court found that no "actual controversy" existed between the parties and therefore dismissed the Plaintiff's action because of a lack of jurisdiction. The Court stated that since state issues was most properly a matter for the courts of Kentucky. A copy of that court's "Memorandum and Order", is annexed to the Complaint, marked "Plaintiff's Exhibit No. 5" and made a part hereof.

12. Paragraph 12 of the Franchise Agreement provides:

> The party of the second part shall commence the construction of the system herein at a reasonable time from the securing of such permits, licenses and approvals and shall prosecute such construction with due diligence; it being understood, as a condition of this franchise, that the construction of such system shall be completed to the extent of making available community antenna service to substantially all of the Citizens of Owensboro, Kentucky, on or before two (2) years from the date hereof or this franchise shall be and become null and void without notice or further act by the party of the first part. For cause, in its sole discretion, the Board of Commissioners of the City of Owensboro, Kentucky may extend said two (2) year deadline from time to time upon written application for same by the second party at least sixty (60) days prior to said deadline or extension thereof.

13. As hereinbefore noted at Paragraph 11, by letter dated October 20, 1970, Plaintiff officially requested of the Defendants a further extension of time from and after December 20, 1970, to complete construction of its CATV

system in the City of Owensboro, such request being based on the identical circumstances supporting the prior two requests.[1] As stated at Paragraph 11 hereof, by Resolution No. 56-70 (Plaintiff's Exhibit No. 4 hereto) enacted subsequent to Plaintiff's initiation of its Federal Declaratory Judgment action, Defendants summarily denied Plaintiff's request.

14. Commencing almost immediately after execution of the Franchise Agreement, Plaintiff encountered unexpected, unforeseeable and severe hardships wholly beyond its control in proceeding to complete construction of its CATV system. Two basic factors unforeseen by Plaintiff have prevented completion of the system.

(1) FCC prohibition against importation of distant signals into the top 100 markets, resulted in a severe loss of subscribers and a concomitant loss of working capital needed for completion of the system. It became an imperative of providing the service needed by the people of Owensboro for Top Vision to concentrate its funds and efforts toward seeking relief at the FCC.[2]

(2) After the foregoing FCC action the existence of the 26% tax provision made it virtually impossible for the Plaintiff to attract either outside equity or working capital from investors, said capital to have been utilized as an alternative source of construction capital to substantially complete the system.

---

[1]This request did, however, indicate that in addition to FCC problems, Top Vision had been experiencing grave difficulty in getting potential capital investors to commit funds in view of the 26% gross receipts tax imposed upon the system.

[2]Owensboro, Kentucky is located within the primary service area of television stations operating in Evansville, Indiana, one of the nation's largest television markets. Under FCC rules and policy adopted subsequent to issuance of the Top Vision Franchise, non-local television stations are not being authorized for carriage by CATV systems operating in the 100 largest television markets of which Evansville, Indiana is the 92nd.

15. Notwithstanding these serious difficulties, Plaintiff has to date expended in excess of $430,000.00 in connection with its Owensboro CATV system, and cable service is presently available to approximately one-third of the citizens of the City.

16. In recognition of the extreme difficulty encountered by Plaintiff from the FCC, Defendants have twice granted extensions of time within which to complete the system. Resolutions 60-67, dated October 6, 1967, and attached hereto as Plaintiff's Exhibit No. 6, sets forth the first extension. This resolution specifically recognizes the fact that the Commissioners ". . . deem said request for an extension of time to be reasonable; . . ." since ". . . the Board of Commissioners is aware of the matters now pending between the Top Vision Cable Company and the Federal Communications Commission . . ." In the most recent grant the Defendants by Resolution No. 66-68 adopted December 20, 1968, granted a two year extension to and including December 20, 1970. Therein the Defendants expressly stated that the City ". . . deem(s) the unforeseen stringent regulation of the Federal Communications Commission now in force and the proposed proceedings challenging them, sufficient cause for granting the written application of Top Vision Cable Company, Inc. for an extension of time within which to complete its system within the City." A complete copy of Resolution No. 66-68 is attached hereto as Plaintiff's Exhibit No. 7.

17. The denial of the most recent extension request by Defendants was an arbitrary abuse of discretion in view of the fact that circumstances before the FCC are substantially unchanged. Moreover, the Defendants have exhibited bad faith insofar as they have contributed directly and substantially to the very situation which has prevented Plaintiff from completing construction by exacting an unlawful fee. Plaintiff has been given no fair and reasonable opportunity to complete construction. Plaintiff was not

notified until November 6, 1970, after it had filed its action in Federal Court that Defendants would not grant a further extension of time within which to complete construction. Thus, it is impossible for Plaintiff to complete construction by December 20, 1970 and Defendants by their own actions have forced a lapse of Plaintiff's Franchise in the absence of relief by this Court through absolutely no fault or omission by Plaintiff.

18. Defendants herein have asserted the position before the Federal Court and privately to Plaintiff that the effect of the *Wonderland* decision is to cause forfeit of Plaintiff's franchise since in Defendant's view the gross receipts tax is not severable from the remainder of the Franchise Agreement. Defendants have sought to regulate the operation of Plaintiff's CATV by ordinance and Franchise as a public utility. Plaintiff has in the past subjected itself voluntarily to the franchise procedure but in so doing has not at any point conceded that such was a necessary part of doing business in the City of Owensboro. Plaintiff now denies that there exists statutory authority vested in the City of Owensboro to permit that municipality to so regulate its operations as a CATV system. In this regard Plaintiff asserts that:

(a) The defendant City has no power or authority generally to franchise community antenna television systems because they are not public utilities subject to municipal regulation and control.

(b) Defendants have no power or authority to require that the construction, operation and maintenance of Plaintiff's system shall be dependent solely upon permission of the defendant City.

(c) Defendants have no power of authority to control the time within which Plaintiff shall obtain permits from any appropriate regulatory agency or commence or complete construction of its facilities.

(d) Defendants have no power or authority to require Plaintiff to donate a portion of its property to the defendant City nor to provide free service to other public and private bodies.

(e) Defendants have no power or authority to require Plaintiff to bid with others for the right to engage in a lawful business on the basis of the largest cash payment and percentage of income to be paid to defendant City.

(f) Defendants have no power or authority to grant a so-called non-exclusive franchise for operation of a community antenna television system in the City of Owensboro which is to be awarded on the basis of bids and will have the practical effect of creating a government imposed monopoly in such business.

19. Therefore, even though the Defendants have conceded the constitutional invalidity of the 26% gross receipts tax, Plaintiff remains in extreme jeopardy in the following ways:

(a) Defendant City of Owensboro through its Board of Commissioners has stated its intention to treat the entire Franchise as void. This means that Plaintiff would lose its business and most likely the more than $430,000.00 it has invested thus far in attempting in good faith to provide CATV service to Owensboro.

(b) The Defendant City of Owensboro through its Board of Commissioners on November 6, 1970, refused to grant Plaintiff's request for extension of time to complete construction. This was an arbitrary and abusive action taken as reprisal against Plaintiff for raising a question as to the validity of the 26% tax in view of the *Wonderland* decision.

The inequity of this situation and Plaintiff's dilemma will be apparent to this Court since it is in large part the existence of the 26% tax which not only renders existing operation most difficult but has rendered it impossible to attract the additional capital necessary to complete construction of the system.

20. Plaintiff is willing to pay a lawful and reasonable fee to the Defendants to defray costs which Defendants may incur relative to the use of the right of ways by Plaintiff. Defendants may not unreasonably withhold such use of the right of ways from Plaintiff in connection with the conduct of Plaintiff's lawful and desirable business.

21. The damages which will be suffered by the Plaintiff unless equitable relief is granted are irreparable and Plaintiff has no adequate remedy of law.

WHEREFORE, Plaintiff prays:

(1) For a judgment declaring and adjudicating that Defendant City of Owensboro has no legislative authority to require that local CATV operations be franchised by the City.

(2) For a judgment declaring that Defendants may not unreasonably withhold use of the public right of ways from Plaintiff and that any charges made therefor be reasonably related to the costs to Defendants of Plaintiff's use.

(3) For a judgment in the alternative declaring and adjudicating the rights and duties of the Plaintiff and Defendants under the provisions of the Franchise Agreement, including but not limited to, the following:

(a) That Section 3, Paragraph 2 of the Agreement is severable from the remainder of the Agreement, thereby preserving said remainder's validity.

(b) That equity requires that Plaintiff be granted an additional, sufficient and reasonable period within

which to complete construction of its CATV system.

(c) That the Court determine a reasonable fee to be paid Defendant City by Plaintiff, to defray costs which Defendants incur relative to the use of the public right of ways consistent with the Interstate Commerce Clause of the Constitution of the United States.

(d) That the Court order Defendants to refund to Plaintiff all monies received from Plaintiff pursuant to the unlawful 26% gross receipts tax.

(e) That the Court prohibit Defendants during the pendency of this action from soliciting or considering bids or granting a Franchise for a CATV operation within the City of Owensboro to any party.

(f) That the Defendant City of Owensboro and all Officers thereof and their successors be restrained from treating the remaining valid part of said Agreement as null and void and of no legal effect, and from preventing or attempting to prevent Plaintiff from operating its CATV system for the purpose of providing service to the citizens of Owensboro by withdrawing said franchise, or otherwise taking reprisals against Plaintiff as a result of its seeking this judicial determination.

Wyatt, Grafton & Sloss
Third Floor
Marion E. Taylor Building
Louisville, Kentucky 40202

/s/ Edgar A. Zingman
/s/ Stuart E. Lampe
McKinley & Howard
/s/ Joseph McKinley
Counsel for Plaintiff

Smith, Pepper, Shack & L'Heureux
1776 K Street, N.W.
Washington, D. C. 10008
Of Counsel

Complaint & Exhibits 1, 2, 3, 4, 5, 6 & 7, each filed.
Civil Summons & 6 copies issued to Daviess Co. Dec. 19, 1970.

Attest: James W. Clayton, Clerk
By: Jean P. Moure, D. C.

## EXHIBIT 1

### ORDINANCE NO. 63-65

AN ORDINANCE DIRECTING THE CITY MANAGER OF THE CITY OF OWENSBORO, KENTUCKY, TO ADVERTISE AND PUBLICLY SELL A FRANCHISE AUTHORIZING THE PURCHASER THEREOF TO USE THE PUBLIC WAYS, STREETS, HIGHWAYS, BRIDGES, OR PUBLIC PLACES OF THE CITY OF OWENSBORO, KENTUCKY, FOR THE PURPOSE OF SUPPLYING VISUAL AND AUDIO TELEVISION AND RADIO SIGNALS TO THE PUBLIC.

BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF OWENSBORO, KENTUCKY, AS FOLLOWS:

SECTION 1. The City Manager of the City of Owensboro, Kentucky, is hereby authorized and directed to advertise and publicly sell, subject to the approval of the Board of Commissioners, a franchise authorizing the purchaser thereof to use the public ways, streets, highways, bridges or public places of the City of Owensboro, Kentucky, for the purpose of supplying community antenna

television and audio television and radio signals to the public.

SECTION 2. The notice of said sale of franchise shall be posted on the public bulletin board at the City Hall and shall be advertised at least once, said publication to be not less than seven (7) days nor more than twenty-one (21) days prior to said sale; said sale date shall be on November 16, 1965, at 10:00 A.M., CST, in the lobby of City Hall and shall be made to the highest and best bidder at such sale; however, the City retains the right to reject any and all bids.

SECTION 3. The advertisement of sale shall contain a description of the franchise to be sold. The terms and conditions of said franchise to be granted in the event the sale is confirmed shall be as follows:

> This Franchise Agreement made and entered into on this the ____ day of _____, 1965, by and between the City of Owensboro, Kentucky, a municipal corporation of the second class, Party of the First Part, and _____ Party of the Second Part.
>
> WITNESSETH: That for and in consideration of the public service to be rendered by the party of the second part to the residents of Owensboro, Kentucky, and the further consideration as more fully set out herein, the party of the first part does hereby grant unto the party of the second part, its successors and assigns, for a period of fifteen (15) years from the date hereof, the franchise and privilege of using the public ways, streets, highways, bridges or public places of the City of Owensboro, Kentucky, for the supplying of visual and audio television and radio signals to the public, subject to the following terms, conditions and covenants, to-wit:

1. The party of the second part, its successors or assigns, shall have the franchise, privilege, right and power to erect, install, construct, re-construct, replace, remove, repair, maintain and operate in or upon, under, above, across and from the streets, avenues, highways, sidewalks, bridges and other public ways, easements, right-of-way and lands, as now existing and all extensions thereof and additions thereto, in the City of Owensboro, Kentucky, all equipment, facilities, appurtenances and apparatus of any nature for the purpose of receiving, amplifying, transmitting and distributing therefrom radio, electrical and electronic energy, pictures, sounds, signals, impulses and communication, uni-directional and multi-directional of every nature and description, audio and video, embracing any and all of the frequencies of the electrical magnetic spectrum and to otherwise engage in the business, services and activities generally known as and practiced now and in the future by community antenna television and audio communication services in accordance with the laws of the United States of America, the Commonwealth of Kentucky and the City of Owensboro, Kentucky, for a period of fifteen (15) years from and after the date hereof; but subject to the restrictions and provisions herein contained.

2. The party of the second part, in consideration of the terms of this franchise, agrees to pay to the party of the first part a sum equal to the cost of the advertising and selling of this franchise, upon proper billing by first party to second party plus the sum of money equal to % of the gross income received by the party of the second part from all sources whatsoever derived within the City of Owensboro, the payment of which shall be payable one-half (½) thereof in semi-annual payments. Said semi-annual payment dates

shall be the 30th day of June and the 31st day of December of each year and each semi-annual payment shall be made within 30 days thereafter. The party of the second part shall keep complete records of accounts showing dates and payments received and any duly authorized agent of the City of Owensboro shall have the right, power and authority to inspect the gross monthly income records of the party of the second part.

3. There is hereby granted to the party of the second part, insofar as the City of Owensboro may legally grant same, the further right, privilege and authority to lease, rent or in any other manner obtain the use of towers, poles, lines, cables and other equipment and facilities from any city owned utility and any and all holders of public licenses and franchises within the corporate limits of the City of Owensboro, subject to all existing and future ordinances, regulations and laws of the City of Owensboro and the Commonwealth of Kentucky. It is the stated intention of the party of the first part that all holders of public licenses and franchises within the corporate limits of the City of Owensboro shall cooperate with the party of the second part to allow party joint useage of their poles and pole-line facilities whenever possible and whenever such use does not interfere with the normal operations of such poles and pole-lines. However, the party of the second part shall own and have complete responsibility for the maintenance and operation of the full system and that responsibility shall not be divided. Prior to the erection or installation of any such towers, poles, guys and anchors on any municipal properties, including public ways and easements, the party of the second part shall secure approval of said location by the City Manager of the City of Owensboro or any

other authorized person designated by the City and also secure approval from any state or county official of any locations on the properties, including public ways and easements of the State of Kentucky and County of Daviess. Such permission shall not be unreasonably withheld on the part of the City.

4. The party of the second part shall, during the existence of this franchise, furnish reasonable, adequate and efficient community antenna reception service to the subscribers connected to its system within the corporate limits of the City of Owensboro and said party of the second part agrees to construct and maintain its system in reasonable repair and working order, said system to be constructed with top grade American made equipment and second party shall provide adequate facilities for maintenance of same. These maintenance requirements may be temporarily suspended by disaster or emergency conditions or other circumstances beyond its reasonable control.

5. The party of the second part shall charge only reasonable rates for the service rendered to its customers, but shall not as to any rates, charges, service facilities, rules, regulations or in any other respect make or grant any preference or advantage to any person or subject any person to any prejudice or disadvantage; provided, however, they shall not be deemed to prohibit the establishment of a graduated scale of charges and classified rate schedules to which any customer, within such classification shall be entitled.

6. The party of the second part shall not directly or indirectly engage in any phase of the business of television receiving set sale, lease, repair or maintenance within the City of Owensboro, Daviess County, Kentucky, nor shall it use its community antenna televi-

sion, radio and audio communication services constructed under this franchise for the purpose of pay television.

7. No privilege or exemption is granted or deferred by this franchise except those specifically prescribed herein. Any privilege claimed under this franchise in any street, public way or easement shall be subordinate to any prior lawful occupancy of the street and to all laws, ordinances and regulations of the City of Owensboro, State of Kentucky and the United States of America. No rights, franchise or privileges herein granted are to be exclusive.

8. The party of the second part shall at all times indemnify, protect and save harmless the City of Owensboro, any official, agency, commission or board thereof from and against any and all liability, losses and physical damage to property and bodily injury or death to persons, including payments made under Workmen's Compensation laws which may arise out of or be caused by the erection, construction, replacement, removal, maintenance and operations of the party of the second part's community antenna television and audio communications service and resulting from or by any negligent fault or misconduct on its part or by its agents, officers, servants and employees and it shall carry a policy or policies of liability insurance indemnifying all loss, damage or destruction of property to the extent of $25,000.00 and as to any one person, city, agency or board in the amount of $100,000.00 and as to any one accident resulting in liability on account of injury to or death of one person and in the amount of $300,000.00 as to any one accident as it may relate to damages to persons and property.

9. The party of the second part shall, in the case of any opening or obstruction in the streets or other pub-

lic ways of the City of Owensboro made by it in the course of construction, operation or removal of its installations, guard such activity by the placement of adequate barriers, fences or boardings, the bounds of which during the periods of dusk and darkness shall be clearly designated by warning lights. In the case of any disturbance or damage to any streets or public ways occurring in the course of erection, installation, construction, reconstruction, replacement, removal, repair, maintenance or operation, the party of the second part shall properly repair and restore same at its own expense. In the event that at any time the party of the first part shall lawfully elect to alter any street, alley or other public way, the party of the second part shall, upon reasonable notice, remove or relocate its poles, wires, cables, conduits or other fixtures at its own expense.

10. The party of the second part shall include in its coverage to its customers any telecast originating from a transmitter located within a forty (40) air mile radius from the City of Owensboro, Kentucky, provided that such telecasts effect either a Grade A, or Grade B, contour in the City of Owensboro as indicated in the current edition of Television Factbook, or any other authoritative publication carrying such designation. It is further agreed and understood that notwithstanding any of the foregoing, the party of the second part shall at all times include within its coverage to its customers telecasts from all of the major networks.

11. The party of the first part may declare a forfeiture of the franchise herein granted in the event of substantial violation of any of the terms hereof upon written notice to the party of the second part specifying the nature of the violation unless such violation is

corrected or ceases to exist within sixty (60) days from the date of the written notice of same to the party of the second part. Such forfeiture shall be by resolution of the Board of Commissioners of the City of Owensboro, Kentucky.

12. The party of the second part shall, within sixty (60) days from the date hereof, make proper application to the Federal Communications Commission and to any and all other governmental agencies, both state and federal as is provided by law, for any permits, licenses or approvals necessary to construct, maintain and operate the system. The party of the second part shall commence the construction of the system herein at a reasonable time from the securing of such permits, licenses and approvals and shall prosecute such construction with due diligence; it being understood, as a condition of this franchise, that the construction of such system shall be completed to the extent of making available community antenna service to substantially all of the citizens of Owensboro, Kentucky, on or before two (2) years from the date hereof or this franchise shall be and become null and void without notice or further act by the party of the first part. For cause, in its sole discretion, the Board of Commissioners of the City of Owensboro, Kentucky, may extend said two (2) year deadline from time to time upon written application for same by the second party at least sixty (60) days prior to said deadline or extension thereof.

13. The franchise, right, privilege and power herein granted, together with all of the terms and conditions hereof, shall extend and apply to the successors and assigns of the party of the second part, however, no assignment of same may be made, except by operation of law, until said assignment has been approved by a

resolution of the Board of Commissioners of the City of Owensboro, Kentucky, which approval shall not be unreasonably withheld. In the event such assignment takes place with such consent, then immediately upon the delivery to the City of Owensboro of the aforesaid agreement of assignment, duly executed by the assignee, all of the rights, obligations and privileges herein granted to the second party shall forthwith devolve upon the assignee who shall in all respects stand in the place and stead of the original corporation hereunder. In the event the party of the second part, or its successors or assigns shall be adjudged bankrupt or placed in receivership, the party of the first part may, at its option, declare the rights herein granted to be forfeited and terminated.

14. As part of the consideration for the rights and privileges herein granted, the party of the second part agrees to provide one free drop, with no monthly service charge to the City Hall building, fire and police stations, public library and to all public and parochial primary and secondary schools located within the City of Owensboro, Kentucky, which are passed by a cable.

15. It is agreed and understood that the party of the second part shall not erect its receiving tower in an area of Daviess County, Kentucky, that will interfere in any manner with aircraft approaches to the Owensboro-Daviess County Airport and shall secure approval of such location from the F.A.A. prior to constructing such receiving tower.

16. In the event any section, clause, paragraph or provision of this grant shall be declared invalid by a court of competent jurisdiction, such invalidity shall not effect the validity of this grant as a whole, or any part thereof, other than the part declared invalid.

IN TESTIMONY WHEREOF, witness the signatures of the parties hereto on this the day and date first hereinabove written.

City of Owensboro, Kentucky

Attest: By _____
Mayor

_____
City Clerk

_____

SECTION 4. The City Manager shall report the sale of said franchise to the Board of City Commissioners which shall then either affirm or reject said sale. In the event of the affirmation of the sale, said Board of Commissioners shall direct the execution and delivery of the franchise to the buyer by the Mayor and City Clerk.

SECTION 5. All ordinances or parts of ordinances in conflict herewith are to the extent of such conflict hereby repealed.

Introduced, publicly read and approved on first reading this 15th day of October, 1965.

Publicly read and approved on second reading this 22nd day of October, 1965.

/s/ Dugan Best
Mayor

Attest:
/s/ Adelle Shelton
City Clerk

STATE OF KENTUCKY }
} SCT.
CITY OF OWENSBORO }

The undersigned as City Clerk of the City of Owensboro, Kentucky, hereby certifies that the above is a true

copy of said Ordinance as same appears on the records of the City of Owensboro, of which records the undersigned is legal custodian.

This July 24, 1970.

(s) Adelle Shelton, City Clerk

## EXHIBITS 2 and 3

### RESOLUTION NO. 36-65

RESOLUTION CONFIRMING SALE OF THE CATV FRANCHISE TO TOP VISION CABLE COMPANY, INC.

WHEREAS, by Ordinance No. 63-65, a Community Antenna Television Franchise was created and defined. Said ordinance also directed the City Manager to advertise for and sell said Franchise, and

WHEREAS, on November 16, 1965, the City Manager of the City of Owensboro did make such sale of franchise to the highest and best bidder, Top Vision Cable Company, Inc. as indicated in his Report of Sale heretofore made to the Board of Commissioners of the City of Owensboro.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COMMISSIONERS OF THE CITY OF OWENSBORO, KENTUCKY, AS FOLLOWS:

SECTION 1. That the sale of the CATV Franchise by the City Manager of the City of Owensboro, Kentucky, to the highest and best bidder, the Top Vision Cable Company for 26% of the gross proceeds of its income as shown on the report of such sale, be, and the same is hereby confirmed, ratified and approved.

SECTION 2. The Mayor and the City Clerk of the City of Owensboro are hereby authorized and directed to execute the Franchise Agreement as defined and created by Ordinance 63-65 and deliver same to the said Top Vision Cable Company, Inc.

Introduced, publicly read and finally approved on one reading this 17th day of December, 1965.

/s/ Dugan Best
Mayor

Attest:
/s/ Adelle Shelton
City Clerk

STATE OF KENTUCKY }
} SCT.
CITY OF OWENSBORO }

The undersigned as City Clerk of the City of Owensboro, Kentucky, hereby certifies that the above is a true copy of Franchise Agreement as same appears on the records of the City of Owensboro, of which records the undersigned is legal custodian.

This July 24, 1970.

This Franchise Agreement made and entered into on this the 17th day of December, 1965, by and between the City of Owensboro, Kentucky, a municipal corporation of the second class, Party of the First Part, and TOP VISION CABLE COMPANY, INC. OF KENTUCKY, Party of the Second Part.

WITNESSETH: That for and in consideration of the public service to be rendered by the party of the second part to the residents of Owensboro, Kentucky, and the further consideration as more fully set out herein, the party of the first part does hereby grant unto the party of the second part, its successors and assigns, for a period of fifteen (15) years from the date hereof, the franchise and privilege of using the public ways, streets, highways, bridges or public places of the City of Owensboro, Kentucky, for the supplying of visual and audio television and radio signals to the public, subject to the following terms, conditions and covenants, to-wit:

1. The party of the second part, its successors or assigns, shall have the franchise, privilege, right and power to erect, install, construct, re-construct, replace, remove, repair, maintain and operate in or upon, under, above, across and from the streets, avenues, highways, sidewalks, bridges and other public ways, easements, right-of-way and lands, as now existing and all extensions thereof and additions thereto, in the City of Owensboro, Kentucky, all equipment, facilities, appurtenances and apparatus of any nature for the purpose of receiving, amplifying, transmitting and distributing therefrom radio, electrical and electronic energy, pictures, sounds, signals, impulses and communication, unidirectional and multi-directional of every nature and description, audio and video, embracing any and all of the frequencies of the electrical magnetic spectrum and to otherwise engage in the business, services and activities generally known as and practiced now and in the future by community antenna television and audio communication services in accordance with the laws of the United States of America, the Commonwealth of Kentucky and the City of Owensboro, Kentucky, for a period of fifteen (15) years from and after the date hereof; but subject to the restrictions and provisions herein contained.

2. The party of the second part, in consideration of the terms of this franchise, agrees to pay to the party of the first part a sum equal to the cost of the advertising and selling of this franchise, upon proper billing by first party to second party plus the sum of money equal to 26% of the gross income received by the party of the second part from all sources whatsoever derived within the City of Owensboro, the payment of which shall be payable one-half (½) thereof in semi-annual payments. Said semi-annual payment dates shall be the 30th day of June and the 31st day of December of each year and each semi-annual payment shall be made within 30 days thereafter. The party of the

second part shall keep complete records of accounts showing dates and payments received and any duly authorized agent of the City of Owensboro shall have the right, power and authority to inspect the gross monthly income records of the party of the second part.

3. There is hereby granted to the party of the second part, insofar as the City of Owensboro may legally grant same, the further right, privilege and authority to lease, rent or in any other manner obtain the use of towers, poles, lines, cables and other equipment and facilities from any city owned utility and any and all holders of public licenses and franchises within the corporate limits of the City of Owensboro, subject to all existing and future ordinances, regulations and laws of the City of Owensboro and the Commonwealth of Kentucky. It is the stated intention of the party of the first part that all holders of public licenses and franchises within the corporate limits of the City of Owensboro shall cooperate with the party of the second part to allow party joint useage of their poles and pole-line facilities whenever possible and whenever such use does not interfere with the normal operations of such poles and pole-lines. However, the party of the second part shall own and have complete responsibility for the maintenance and operation of the full system and that responsibility shall not be divided. Prior to the erection or installation of any such towers, poles, guys and anchors on any municipal properties, including public ways and easements, the party of the second part shall secure approval of said location by the City Manager of the City of Owensboro or any other authorized person designated by the City and also secure approval from any state or county official of any locations on the properties, including public ways and easements of the State of Kentucky and County of Daviess. Such permission shall not be unreasonably withheld on the part of the City.

4. The party of the second part shall, during the existence of this franchise, furnish reasonable, adequate and efficient community antenna reception service to the subscribers connected to its system within the corporate limits of the City of Owensboro and said party of the second part agrees to construct and maintain its system in reasonable repair and working order, said system to be constructed with top grade American made equipment and second party shall provide adequate facilities for maintenance of same. These maintenance requirements may be temporarily suspended by disaster or emergency conditions or other circumstances beyond its reasonable control.

5. The party of the second part shall charge only reasonable rates for the service rendered to its customers, but shall not as to any rates, charges, service facilities, rules, regulations or in any other respect make or grant any preference or advantage to any person or subject any person to any prejudice or disadvantage; provided, however, they shall not be deemed to prohibit the establishment of a graduated scale of charges and classified rate schedules to which any customer, within such classification shall be entitled.

6. The party of the second part shall not directly or indirectly engage in any phase of the business of television receiving set sale, lease, repair or maintenance within the City of Owensboro, Daviess County, Kentucky, nor shall it use its community antenna television, radio and audio communication services constructed under this franchise for the purpose of pay television.

7. No privilege or exemption is granted or deferred by this franchise except these specifically prescribed herein. Any privilege claimed under this franchise in any street, public way or easement shall be subordinate to any prior lawful occupancy of the street and to all laws, ordinances and regulations of the City of Owensboro, State of Kentucky and the United States of America. No rights, franchise or privileges herein granted are to be exclusive.

8. The party of the second part shall at all times indemnify, protect and save harmless the City of Owensboro, any official, agency, commission or board thereof from and against any and all liability, losses and physical damage to property and bodily injury or death to persons, including payments made under Workmen's Compensation laws which may arise out of or be caused by the erection, construction, replacement, removal, maintenance and operations of the party of the second part's community antenna television and audio communications service and resulting from or by any negligent fault or misconduct on its part or by its agents, officers, servants and employees and it shall carry a policy or policies of liability insurance indemnifying all loss, damage or destruction of property to the extent of $25,000.00 and as to any one person, city, agency or board in the amount of $100,000.00 and as to any one accident resulting in liability on account of injury to or death of one person and in the amount of $300,000.00 as to any one accident as it may relate to damages to persons and property.

9. The party of the second part shall, in the case of any opening or obstruction in the streets or other public ways of the City of Owensboro made by it in the course of construction, operation or removal of its installations, guard such activity by the placement of adequate barriers, fences or boardings, the bounds of which during the periods of dusk and darkness shall be clearly designated by warning lights. In the case of any disturbance or damage to any streets or public ways occurring in the course of erection, installation, construction, reconstruction, replacement, removal, repair, maintenance or operation, the party of the second part shall properly repair and restore same at its own expense. In the event that at any time the party of the first part shall lawfully elect to alter any street, alley or other public way, to party of the second part shall, upon reasonable notice, remove or relocate its poles, wires, cables, conduits or other fixtures at its own expense.

10. The party of the second part shall include in its coverage to its customers any telecast originating from a transmitter located within a forty (40) air mile radius from the City of Owensboro, Kentucky, provided that such telecasts effect either a Grade A, or Grade B, contour in the City of Owensboro as indicated in the current edition of Television Factbook, or any other authoritative publication carrying such designation. It is further agreed and understood that notwithstanding any of the foregoing, the party of the second part shall at all times include within its coverage to its customers telecasts from all of the major networks.

11. The party of the first part may declare a forfeiture of the franchise herein granted in the event of substantial violation of any of the terms hereof upon written notice to the party of the second part specifying the nature of the violation unless such violation is corrected or ceases to exist within sixty (60) days from the date of the written notice of same to the party of the second part. Such forfeiture shall be by resolution of the Board of Commissioners of the City of Owensboro, Kentucky.

12. The party of the second part shall, within sixty (60) days from the date hereof, make proper application to the Federal Communications Commission and to any and all other governmental agencies, both state and federal as is provided by law, for any permits, licenses or approvals necessary to construct, maintain and operate the system. The party of the second part shall commence the construction of the system herein at a reasonable time from the securing of such permits, licenses and approvals and shall prosecute such construction with due dilligence; it being understood, as a condition of this franchise, that the construction of such system shall be completed to the extent of making available community antenna service to substantially all of the citizens of Owensboro, Kentucky, on or before two (2) years from the date hereof or this franchise

shall be and become null and void without notice or further act by the party of the first part. For cause, in its sole discretion, the Board of Commissioners of the City of Owensboro, Kentucky, may extend said two (2) year deadline from time to time upon written application for same by the second party at least sixty (60) days prior to said deadline or extension thereof.

13. The franchise, right, privilege and power herein granted, together with all of the terms and conditions hereof, shall extend and apply to the successors and assigns of the party of the second part, however, no assignment of same may be made, except by operation of law, until said assignment has been approved by a resolution of the Board of Commissioners of the City of Owensboro, Kentucky, which approval shall not be unreasonably withheld. In the event such assignment takes place with such consent, then immediately upon the delivery to the City of Owensboro of the aforesaid agreement of assignment, duly executed by the assignee, all of the rights, obligations and privileges herein granted to the second party shall forthwith devolve upon the assignee who shall in all respects stand in the place and stead of the original corporation hereunder. In the event the party of the second part, or its successors or assigns shall be adjudged bankrupt or placed in receivership, the party of the first part may, at its option, declare the rights herein granted to be forfeited and terminated.

14. As part of the consideration for the rights and privileges herein granted, the party of the second part agrees to provide one free drop, with no monthly service charge to the City Hall building, fire and police stations, public library and to all public and parochial primary and secondary schools located within the City of Owensboro, Kentucky, which are passed by a cable.

15. It is agreed and understood that the party of the second part shall not erect its receiving tower in an area of Daviess County, Kentucky, that will interfere in any man-

ner with aircraft approaches to the Owensboro-Daviess County Airport and shall secure approval of such location from the F.A.A. prior to constructing such receiving tower.

16. In the event any section, clause, paragraph or provision of this grant shall be declared invalid by a court of competent jurisdiction, such invalidity shall not effect the validity of this grant as a whole, or any part thereof, other than the part declared invalid.

IN TESTIMONY WHEREOF, witness the signatures of the parties hereto on this the day and date first hereinabove written.

City of Owensboro, Kentucky

By /s/ Dugan Best
Mayor

Attest:

/s/ Adelle Shelton
City Clerk

(Seal)

Top Vision Cable Company, Inc.
of Kentucky

By /s/ Harold R. Sagraves
Vice-President

STATE OF KENTUCKY }
} SCT.
CITY OF OWENSBORO }

The undersigned as City Clerk of the City of Owensboro, Kentucky, hereby certifies that the above is a true copy of Franchise Agreement as same appears on the records of the City of Owensboro, of which records the undersigned is legal custodian.

This July 24, 1970.

/s/ Adelle Shelton
City Clerk

## EXHIBIT 4

### RESOLUTION NO. 56-70

RESOLUTION DENYING REQUEST FOR EXTENSION OF TIME TO COMPLETE SYSTEM AND CONCEDING THE INVALIDITY OF SECTION 2 OF THE FRANCHISE AGREEMENT OF TOP VISION CABLE COMPANY, INC. PROVIDING FOR PAYMENT OF 26% OF ITS GROSS PROCEEDS.

WHEREAS, the Top Vision Cable Company, Inc. of Kentucky agreed to complete the construction of a CATV system in the City of Owensboro to the extent of making available to substantially all the citizens of Owensboro CATV service on or before December 17, 1967, and,

WHEREAS, the City of Owensboro, pursuant to written application of Top Vision Cable Company, Inc., has extended the time for completion of said system to December 20, 1970, and,

WHEREAS, on the 4th day of November, 1970, the said Top Vision Cable Company, Inc. did deliver to the City a written request bearing date of October 20, 1970, for an extension of an additional one year period from December 20, 1970, for the completion of said system, and,

WHEREAS, the City of Owensboro does not deem further extension of time for the completion of said system to be in the interests of the citizens of Owensboro, and,

WHEREAS, the City of Owensboro wishes to officially concede and agree with the position taken by Top Vision Cable Company, Inc. that the agreement of said company to pay the City 26% of the gross income of the Top Vision Cable Company, Inc. derived in the City of Owensboro in consideration of the franchise agreement it holds is invalid under the interstate commerce clause of the United States Constitution,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COMMISSIONERS OF THE CITY OF OWENSBORO, KENTUCKY, AS FOLLOWS:

SECTION 1. The request of Top Vision Cable Company, Inc. for an extension of time from and after December 20, 1970, for the substantial completion of its CATV system in the City of Owensboro is hereby denied.

SECTION 2. The City of Owensboro does hereby officially declare its concession to and agreement with the position of Top Vision Cable Company, Inc. that its agreement to pay to the City 26% of the gross proceeds realized by it from the operation of a CATV system in the City of Owensboro is invalid and unenforceable under Article I, Section 8, Clause III of the Constitution of the United States.

Introduced, publicly read, rule suspended, and finally adopted this 6th day of November, 1970.

/s/ Irvin Terrill
Mayor

Attest:

/s/ Adelle Shelton
City Clerk

STATE OF KENTUCKY
COUNTY OF DAVIESS

I, Adelle Shelton, City Clerk of the City of Owensboro, Kentucky, hereby certify that the above is a true copy of Resolution No. 56-70 as finally approved by the Board of Commissioners of the City of Owensboro, Kentucky, on November 6, 1970, as same appears of record in my office, of which records I am legal custodian.

This November 10, 1970.

/s/ Adelle Shelton
City Clerk

EXHIBIT 5

In the

# UNITED STATES DISTRICT COURT

For the Western District of Kentucky
at Owensboro

Civil Action No. 2519

TOP VISION CABLE, INC. - - - - - *Plaintiff*

*v.*

CITY OF OWENSBORO, KENTUCKY, ET AL. - *Defendants*

## MEMORANDUM AND ORDER

In October, 1965, the Board of Commissioners of the City of Owensboro, Kentucky, enacted Ordinance No. 63-65 empowering the City Manager of Owensboro to advertise and sell "a franchise authorizing the purchaser thereof to use the public ways, streets, highways, bridges or public places of the City of Owensboro, Kentucky, for the purpose of supplying community antenna television and audio television and radio signals to the public". Consideration for the franchise was to be a sum equal to the cost of advertising and selling the franchise, plus a percentage of the purchaser's gross income derived from within the City of Owensboro. Plaintiff, a Kentucky Corporation, obtained the franchise with a bid of 26% of its gross income. The original contract between the parties called for substantial completion of the CATV system within two years. How-

ever, on written application of plaintiff, the City extended the completion date to December 20, 1970.

Early in 1970 the Court of Appeals for the Sixth Circuit held that two ordinances substantially similar to the Owensboro Ordinance were unconstitutional because they imposed a gross receipts tax upon proceeds from interstate commerce. Wonderland Ventures, Inc. v. City of Sandusky, Wonderland Ventures, Inc. v. City of Fremont, 423 F. 2d 548 (6th Cir. 1970). Thereafter, plaintiff filed an action in this Court seeking a declaration that Ordinance 63-65 is unconstitutional and a determination of the rights and liabilities of the parties under the 1965 agreement.

On November 6, 1970, the Board of Commissioners of the City of Owensboro approved Resolution No. 56-70 wherein it was conceded that the provision of Ordinance No. 63-65 calling for payment to the City of a certain percentage of the franchise purchaser's gross income "is invalid and unenforceable under Article I, Section 8, Clause III of the Constitution of the United States". Defendants have now filed a motion to dismiss the complaint for lack of jurisdiction over the subject matter on the ground that there is no disagreement between the parties regarding the only federal question raised by the complaint. In its response to the motion to dismiss plaintiff urges us to declare Ordinance No. 63-65 unconstitutional and to reach the questions of Kentucky law under the theory of pendent jurisdiction.

Section 2201 of Title 28, United States Code, requires that in every suit for a declaratory judgment an *actual controversy* exist between the parties. In this section the term "controversy" is used in its constitutional sense. U. S. Const. Art. III, §2, cl. 1; Public Service Commission of Utah v. Wycoff Co., Inc., 344 U. S. 237 (1952); Muller v. Olin Mathieson Chemical Corp., 404 F. 2d 501 (2nd Cir. 1968). It is hornbook law that a federal court has no power

to hear claims that do not satisfy the "case or controversy" requirement of the Constitution. United Public Workers of America (C.I.O.) v. Mitchell, 330 U. S. 75 (1947); Muskrat v. United States, 219 U. S. 346 (1911). If for any reason a federal court lacks jurisdiction to hear the only federal claim before it, absent diversity of citizenship it cannot reach other questions of state law raised by the complaint. United Mine Workers of America v. Gibbs, 383 U. S. 715 (1966); California Water Service Co. v. Redding, 304 U. S. 252 (1938).

Questions regarding the "case or controversy" requirement most commonly arise when the facts indicate that the *interests* of the parties are not sufficiently adverse. Usually it is clear from the pleadings that the parties disagree on some point of law. In the case at bar, curiously enough, the usual situation is reversed. While the pleadings and motions clearly indicate that the interests of the parties are adverse, both sides apparently are in complete agreement regarding the only federal question raised.

Counsel have cited no cases directly on point in their supporting memoranda, and we also have been unable to find any. However, after careful consideration, we have concluded that neither the framers of the Constitution nor the Congress could have intended us to rule on a question of constitutional law concerning which no disagreement exists between the parties, merely for the purpose of reaching additional state law questions under the theory of pendent jurisdiction. State issues predominate in this case, and we think that their resolution should be left to the courts of Kentucky. Accordingly, we hold that no actual controversy exists between the parties as to the only federal question raised by the complaint, and that therefore we lack jurisdiction to rule on both the constitutionality of Ordinance No. 63-65 and on the rights and liabilities of the parties under Kentucky law.

In view of our disposition of this case it is unnecessary to rule on defendants' motion to dismiss for failure to state a claim upon which relief can be granted. Defendants' motion to dismiss for lack of jurisdiction over the subject matter is SUSTAINED.

November 19, 1970

/s/ James F. Gordon
United States District Judge

Copies to:
Hon. Joseph H. McKinley
Hon. E. Stratford Smith
Hon. Hugh D. Moore

## EXHIBIT 6

### RESOLUTION NO. 60-67

RESOLUTION AUTHORIZING EXTENSION OF TIME FOR COMPLETION OF CATV SYSTEM IN OWENSBORO.

WHEREAS, the Top Vision Cable Company, holder of a CATV Franchise for the City of Owensboro, has requested the Board of Commissioners by letter dated October 5, 1967, that the two year period provided for in its franchise during which its CATV system shall be completed, be extended for an additional twelve months due to its operations being halted by hearing currently pending with the Federal Communications Commission; and

WHEREAS, the Board of Commissioners is aware of the matters now pending between the Top Vision Cable Company and the Federal Communications Commission and deem said request for an extension of time to be reasonable;

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COMMISSIONERS OF THE CITY OF OWENSBORO, KENTUCKY, AS FOLLOWS:

SECTION 1. That the request of the Top Vision Cable Company for a twelve (12) month extension of the time within which the construction of its system shall be completed to the extent of making available community antenna service to substantially all of the citizens of Owensboro be, and the same is hereby granted.

Introduced, publicly read, rules suspended and finally approved on one reading this October 6, 1967.

(s) Irvin Terrill
Mayor Pro Tem

Attest:
(s) Adelle Shelton
City Clerk

October 5, 1967

Board of Commissioners
City of Owensboro, Kentucky

Max N. Rhoads, City Manager

Re: CATV Franchise
Completion Date

Gentlemen:

Referring to Article 12 in our Franchise granted December 17, 1965, it states "that the construction of such system shall be completed to the extent of making available community antenna service to substantially all of the citizens of Owensboro, Ky., on or before two (2) years from the date hereof or this franchise shall be and become null and void without notice or further act by the party of the first part. For cause, in its sole discretion, the Board of Commissioners of the City of Owensboro, Kentucky, may extend said two (2) year deadline from time to time upon written application for same by the second party at least sixty (60) days prior to said deadline or extension thereof."

Due to circumstances beyond our control, a situation you gentlemen are well aware of has hindered us from con-

struction work as we had planned. At the present time we have 55 miles of system in operation and have another 100 miles to complete.

As per the provision made in our franchise, we are asking for an extension of 12 months from the date the FCC grants us a permanent waiver.

Very truly yours,

Drexel V. Bates
Chairman of the Board

DVB:jd

EXHIBIT 7

RESOLUTION NO. 66-68

RESOLUTION GRANTING EXTENSION OF TIME TO DECEMBER 20, 1970 FOR CONSTRUCTION OF CATV SYSTEM WITHIN CITY OF OWENSBORO, KY.

WHEREAS, the City of Owensboro has heretofore granted to Top Vision Cable Company, Inc. the Franchise created by Ordinance No. 63-65, which provides for the operation of a CATV system in the City of Owensboro, and

WHEREAS, Section 12 of said Franchise provides that the Board of Commissioners of the City of Owensboro may, in its discretion for cause, extend the time therein specified for the completion of said system within the City, and

WHEREAS, since the granting of said Franchise the Federal Communication Commission has adopted regulations which would adversely affect the contemplated operation of said system within the City, and

WHEREAS, the said Top Vision Cable Company, Inc. has agreed to institute proceedings before the Federal Communication Commission in an effort to relieve the CATV System in the City of Owensboro from the operation of certain restrictive regulations of said Commission, said pro-

ceedings being novel in character and constituting a "test case", and

WHEREAS, the Board of Commissioners deem the unforeseen stringent regulation of the Federal Communication Commission now in force and the proposed proceedings challenging them, sufficient cause for granting the written application of Top Vision Cable Company, Inc. for an extension of time within which to complete its system within the City.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COMMISSIONERS OF THE CITY OF OWENSBORO, KENTUCKY, AS FOLLOWS:

SECTION 1. Top Vision Cable Company, Inc. is hereby granted an extension of time to and including December 20, 1970, to substantially complete construction of a CATV system within the City of Owensboro as provided in the Franchise from the City for said system heretofore granted.

Introduced, publicly read and approved on one reading this December 20, 1968.

/s/ C. Waitman Taylor, Jr.
Mayor

Attest:
/s/ Adelle Shelton
City Clerk

October 5, 1967

Board of Commissioners
City of Owensboro, Kentucky

Max N. Rhoads, City Manager

Re: CATV Franchise
Completion Date

Gentlemen:

Referring to Article 12 in our Franchise granted December 17, 1965, it states "that the construction of such system shall be completed to the extent of making avail-

able community antenna service to substantially all of the citizens of Owensboro, Ky., on or before two (2) years from the date hereof or this franchise shall be and become null and void without notice or further act by the party of the first part. For cause, in its sole discretion, the Board of Commisioners of the City of Owensboro, Kentucky, may extend said two (2) year deadline from time to time upon written application for same by the second party at least sixty (60) days prior to said deadline or extension thereof."

Due to circumstances beyond our control, a situation you gentlemen are well aware of has hindered us from construction work as we had planned. At the present time we have 55 miles of system in operation and have another 100 miles to complete.

As per the provision made in our franchise, we are asking for an extension of 12 months from the date the FCC grants us a permanent waiver.

Very truly yours,

Drexel V. Bates
Chairman of the Board

DVB:jd